Presented by Mrs. Buxton.

A COMMENT
ON THE
COMMENTARIES

A COMMENT

ON THE

COMMENTARIES

A CRITICISM OF

WILLIAM BLACKSTONE'S

COMMENTARIES ON THE LAWS OF ENGLAND

BY

JEREMY BENTHAM

Now first printed from the Author's Manuscript

With Introduction and Notes

BY

CHARLES WARREN EVERETT

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EDITOR'S PREFACE

THE MS. of the *Comment on the Commentaries* was found in the course of an examination of the huge mass of Bentham's papers and letters in the library of University College, London. The University College MSS. are kept in 172 portfolios and wooden boxes, each containing about 300 loose sheets. In 1894 the MSS. were classified as they now stand, and a rough catalogue according to subject was made. The MSS. are so voluminous and fragmentary and repetitious, however, that if the pages were arranged in logical or chronological sequence, which they are not, it would be difficult even for a person hunting for specific material which he knew to exist to find what he wanted. As I was carrying on a general search for material for a definitive Life of Bentham, the catalogue was useless, and a haphazard investigation would have been little better than none at all. Consequently, I proceeded to examine all the MSS. to find out what was in them, cataloguing them for future reference. As I examined, I divided each box or portfolio into several manila folders—as many as thirty in some instances—describing the contents of each folder on its cover before replacing in the portfolio. Several interesting items came to light as I went along, but the most important, a part of the present work, was found in Portfolio 28. Portfolio 28 consisted of several hundred sheets of loose MS. tied up in brown paper in an old ledger cover labelled *Common Law*, *Statute Law*, *Divine Law*. The catalogue description, incidentally, was copied verbatim from the label.

The MS. of Portfolio 28 is in folio written on all four

pages, and headed at the top of each page by the titles used in the table of contents in this book, such as Municipal Law; Roman Law, how far consented to by the people? and Interpretation of Laws. It was necessary to read only a few pages to see from the remarks about 'our Author' that this was an attack on Blackstone similar to the *Fragment on Government*. The handwriting and the paper were both similar to those of other Bentham MSS. in the British Museum known to be before 1780. Finally, in going through the material, I found a single sheet with a few memoranda on it as to the proper method of developing the book, and this sheet was headed *A COMMENT ON THE COMM^S*. This was fairly good evidence that here was the original work from which the *Fragment on Government* had been detached and published, as Bentham explains in the preface to that book, 'as the first, if not the only part of a work, the principal and remaining part of which may possibly see the light some time or other, under some such title as that of "A Comment on the Commentaries".' *

Following a hint given by M. Halévy in his *La Jeunesse de Bentham* (p. 292) that Portfolio 96 contained important fragments of the *Comment on the Commentaries*, an examination of Portfolio 96 was made. The fragments there were on the same kind of paper, headed, written, and paged in the same fashion as those in Portfolio 28. Fortunately, in both portfolios, each chapter is paged separately, and the order of chapters is easily determined from Blackstone, since the whole is a running comment on sections two and three of volume one of the *Commentaries*. A few pages of MS. which are not paged and are not continuous with

* *Fragment on Government*, Montague's edition, p. 98.

the text, as well as a few pages of what is probably superseded first draft, are reprinted in the notes.

The paging of the MS. is reproduced in the margin. All notes are Bentham's unless indicated as the editor's by brackets.

The first part of the Introduction tells how the *Comment on the Commentaries* came to be written. The facts concerning Bentham's love affair have not appeared in print before. The second part of the Introduction aims to call attention to some of the more striking differences between Bentham's and Blackstone's conceptions of law.

My thanks are especially due to M. Élie Halévy and to Professor Graham Wallas for their intimations as to the value of the Bentham MSS. at University College, London, and to the Social Science Research Council of America for giving me a research fellowship to investigate the MSS. The Library Committee of University College, London, have generously granted the right to publish the *Comment on the Commentaries* and have afforded me every facility for examining the MSS.

C. W. E.

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INTRODUCTION

I

THE *Comment on the Commentaries* was begun in 1774, five years after Jeremy Bentham's admission to the bar, and ten years after he had, at the age of sixteen, heard Blackstone deliver his Oxford lectures on English law. For those ten years Bentham had little to show. He had advised his clients, in certain cases which his father had secured for him, to come to a compromise and avoid the expense of a litigation which would be profitable only to the court and lawyers involved. Jeremiah Bentham, aware and only too proud of his son's genius, had yet been dismayed to find him determined to choose his own path, disregarding the advice of his elders. In respectful but direct language the young man had declared in 1772 that his work on the *Elements of Critical Jurisprudence* must take precedence over the practice of law. 'With me', he wrote to his father, 'it is a matter of necessity —I cannot rest until I feel myself everywhere at the bottom— I cannot go on with what is *before* me, while I have anything behind me unexplored—I feel myself to have acquired to a considerable degree that pleasing and uncommunicable sensation. —Thus only can one hope to keep clear of those inconsistencies into which I see my predecessors (as far as I have predecessors) humble servants for the most part to authority and to one another, falling evermore. Forgive me, Sir, if I declare simply, and once for all, that till this great business is disposed of I feel myself unable to think of any other. The Will is here out of the question. . . . In the track I am in, I march up with alacrity and hope: in any other I should crawl on with despondency and reluctance.' *

As he had £103 a year from his mother's marriage portion, he was free, as far as that sum would support him, to spend his time in his chambers in Lincoln's Inn as he liked. With a plan as large as his announced one of surveying the whole field of jurisprudence, it is not surprising that in those ten years he had

* Add. MSS. British Museum 33537, pp. 242–3, Oct. 1772, cited by Halévy, *La Formation du Radicalisme philosophique*, i. 297.

brought no particular part of the design to a conclusion. He attended the courts, read widely, discussed his ideas with his friend John Lind and with his younger brother Samuel, who afterwards became General Sir Samuel Bentham, and went quietly on with his study and analysis of the principles of human action and their relation to the work of the legislator, in much the same way in which he was to work for fifty-eight years more.

Lind, a barrister and writer, was much more of a man of affairs, interested rather in politics and immediate reforms than in political philosophy, known already to the public as the author of *Letters on Polish Affairs*. While Bentham was away on a visit to Whitchurch in Hampshire, Lind began work on another book, which was to be an attack on Blackstone's *Commentaries*. Lind knew Bentham's dislike for Blackstone, and quite possibly had been influenced by Bentham's attitude in selecting the Commentaries as a subject for attack. Having made a critical survey of Blackstone's introduction and having worked it up into the rough draft of a book, he sent this draft to Bentham for his criticism.

Bentham found Lind's work so unsatisfactory that the easiest way to point out the defects was to rewrite certain passages himself. Once started, Bentham, with his usual thoroughness, found it impossible to stop half-way, and the *Comment on the Commentaries* resulted. His letter to Lind explaining what he was doing is worth giving in full as showing the way in which with him an idea became a book.*

'One word my dearest friend in the midst of the anxiety that my own foolish sensibilities have brought upon me, about *the Book*. I have looked it over—I have found juster sentiments in it, that is, sentiments more correspondent to my own (for that is all that any man in such a case can mean) than I have yet seen anywhere in print. At the same time, I have found in some places the sentiments expressed otherwise than I could have wished, in others the sentiments themselves different from those I saw reason to entertain. I have remarked what seemed to me the following imperfections. The style too much *agitated*—running too much into interrogations and exclamations. Too much pathos in it in some places for an attack upon a work which in its nature is not pathetic. Not so uniform as could be wished:

* Add. MSS. B. M. 33537, pp. 322–3, Oct. 5, 1774.

vibrating too quickly between a vein of invective which supposes commotion, and a vein of Irony which supposes tranquility. Scarce any part of it so light, so Voltairian as many of your papers or other subjects that I have seen. That legerete is the quality of a mind at ease. A mind to be at ease must feel itself master of the subject. You are not yet exercised enough in it to be so, and you have too much discernment to fancy yourself so when you are not. Pardon the comparison; your manner of treating it is much like what mine was two or three years ago. You are teaching while you are learning: you have instruction to seek yourself, while you have correction to give him: you have your own ideas to form, while you have his to censure: In pushing him down the hill, you have to climb up it yourself. Were you already up, you could take a commanding view of the field, choose your ground beforehand and combat him with more advantage. This makes you in some places take larger compass than perhaps is necessary. I have always found it so myself. Leading ideas, principles, take up many more words in their first disclosure than are sufficient to contain them afterwards. This Locke has seen, has intimated in his preface; * and his own work as he acknowledges, and as itself proves, is an example of it. Without Locke I could have known nothing. But I think I could now take Locke's Essay and write it over again, so as to make it much more precise and apprehensible in half the compass. The circuits you take to matters collateral to the principal subject seem in some places too wide and too long continued. You stick not close enough to his words: you put a sense upon his words, and draw inferences from that sense after you have expressed it in words of your own: in this you are some times much too bountiful; and by such unmerited bounty expose yourself to censure. If he had a sense, that sense might be put into other words: but the truth is he had none; and so departing from his words you depart from everything. If your inferences run counter to his own words, it is your fault and will be laid to you; if his own words run counter to his own words, it is his fault and will be laid to him. What you should do therefore is to rake up his words from all quarters, drag them to the light together, and drive them bang against each other. What

* [Locke, *Essay on the Human Understanding.*, Epistle to the Reader, p. 3 (6th edition).]

I write now is from memory, and as things struck me in the general: I will not answer for being exact; I cannot nor will you expect I should in the compass of a letter support my observations by particular examples. Nor can I answer for it absolutely that every observation I have seen cause to make is includable in the heads that I have mentioned. At the same time, few alterations occurred to me that could be made in the compass of a line or two. Your wish, I am persuaded, is sincerely for my opinion. I give it to you as sincerely. For the sake of your present satisfaction my endeavour would be to represent it as favourable to the book as it would warrant: for the sake of your future more lasting satisfaction not a tittle more so. This then is my opinion concerning the probable success of it: supposing it finished as begun without further alterations or amendments. I think for example that it is much better, much more instructive, bulk for bulk, than the short treatise on Obligation for which Payne gave a hundred pound. But I do not think it a work, take it in its present state that would fulfil the expectations that would be entertained of a man known to be the author of the Polish Letters or of Ibrahim to the Haje. All this while you ought to look upon me as a very incompetent representative of the public judgement from the particular circumstances in my case that tend to make the merits of it appear less to me than they are. The principal merit of the observations in it, novelty, a merit that it will have with the public, is a merit that is lost upon me: who have now been for so many years poring over the subject, and as you know, have fallen in almost every part, into the same train of thinking.

'Not bearing (you know my severity to myself and my affection to you which make me treat you as I would myself), not bearing I say, to set my fiat, such as it is, upon anything in the success of which I was so much interested that fell short of the model of perfection I could make to myself, this is what I have done. The shortest way of letting you know how I would have it in any passage I thought would be to endeavour to make it as I would have it myself. I had no notion at first of going on regularly: but I was drawn in insensibly, and have now written in quantity half or two-thirds for ought I know (or more) as much as yours amounts to. In short, I have fleshed myself in the game, and have taken a fancy to the sport. In consequence of

this the following proposals have come in my head to make to you: you shall see what I have done, and then determine. Take what I have done, if you happen to approve of it more than of your own, go on with it upon that plan, consider the whole as your own, most heartily will you be welcome: or else 2nd, Let me go on with it under your inspection, and with your corrections, and let profit or loss be equally divided between us, or 3dly, if you approve of neither of these, I believe I shall be tempted to go on with it on my own account keeping it back half a year if you think that enough, that it may not hurt yours, its parent, to which it will have been so much indebted. Think not that if I were to execute the remainder, the half of the profit and of the reputation if there is any would be more than in strictness is your due: it would have been just as impossible for me to have done what I have done without the encouragement and assistance I have had from you, as for you to have done it. In such case, if owned to anybody, it must be spoken of as our joint concern.'

Lind seems to have withdrawn from the work, feeling that the book was in more competent hands than his, and turned his attention to what was to appear the next year as *Remarks on the Principal Acts of the Thirteenth Parliament of Great Britain*, chiefly with reference to the relations between Great Britain and the colonies. As for Bentham, though he had made a good beginning on the book, he had too many projects in mind to keep entirely to the *Comment on the Commentaries*. He was working on the Elements of Critical Jurisprudence, which was to be printed seven years later as the *Introduction to the Principles of Morals and Legislation*, and on a treatise on Punishments, as well as helping Lind with his *Remarks*. The *Comment on the Commentaries* went on side by side with these, though in rather desultory fashion.*

Then Jeremy Bentham, aged twenty-seven, a barrister who refused to practise, fell in love with a Miss Dunkly. She was a pretty girl with no fortune, a friend of Mr. and Mrs. Lind's, at whose house Bentham probably met her. Falling in love had not been included in the plan to reform the whole body of English law, and it complicated matters. Jeremiah Bentham had married for love, but was not disposed to countenance such

* See his letter to Samuel Bentham, Add. MSS. B.M. 33537, p. 316.

an act of rashness in his son. He gave Jeremy plainly to understand that a marriage so foolish, so 'criminal', would be without parental blessing or bounty.* In this difficulty Lind came forward with a suggestion. The *Comment on the Commentaries* was well under way, why should not Bentham turn professional writer and support himself and his wife by his pen? It was, in fact, the only course which seemed open, unless Bentham was prepared to turn his back upon the great career he had planned and to take up the practice of 'law as it is'. The young man was deeply stirred emotionally by his love affair, but go back to the practice of law he could not. Lind's suggestion roused the hopes that had been dashed by his father's attitude, and spurred him on to complete the *Comment*. On May 23, 1775, he wrote to his brother, telling him his plans: †

'Ah, my dear Sam, how shall I set down to write to thee or now I have set down, how shall I know when to leave off? Yes, bad success indeed, that is the reason of my long silence. 'Tis impossible for me to think of giving the particulars by letter. . . . My present plan is in a few words this. I believe I shall spend the next half year at Mr. Lind's. My Father (when will miracles cease?), knows it and tolerates it. Mr. Lind will assist me in rummaging over the Statute-books for materials and heads etc. for a Digest. In the intervals of that employment which will be many I shall go on with my *Comment on the Commentaries*. I hope still to have completed it in 3 months or 4 at the furthest.

"Tis on this rests my sole dependance now for the accomplishment of my marriage Scheme. I find that according to the course of the Market £120 may not unreasonably be expected from a Book-seller for a handsome octavo volume. If the reception that my first scheme meets with is such as entitles me to think I can have alacrity enough to produce one every year, I shall trust to that, and take the desperate leap, trusting to the chapter of accidents and my step mother's good offices, for reconciling my Father. At present we are all the best friends imaginable. He certainly does love you and me next to his money. . . . Mr. Lind offered me his house as an asylum if I would venture immediately upon marriage, but I declined (you may imagine with what gratitude) for the reasons I have above intimated and

* Add. MSS. B. M. 33537, pp. 340, 365, 367.

† Ibid., pp. 343–4.

because I could not justify it to myself the hazarding of everything upon the uncertainty of his affairs. . . . I expect today an answer from a gentleman who has seen my chambers and seems inclined to take them. If so, I shall migrate to Mr. Lind's and there if Fortune should smile upon me, shall be in readiness to receive my Polly.'

It was easy to assume a buoyant tone in sketching such a plan off hand, but difficult to maintain high spirits for months while carrying it into execution, particularly when the execution involved bringing other people to ways of thinking opposed to their habits of thought. To a person of Bentham's sensitiveness, a crisis of this sort must have been trying. Accustomed for years to cool reflection and to an ironic appreciation of life's absurdities, he was now thrown as the chief character into what might have been the plot of a romantic novel. He had to convince a matter-of-fact and socially ambitious father of the prudence of his plans, when he himself knew them to be highly imprudent unless his father made a handsome settlement. He had to explain to a seventeen year old girl in love with him how he was acting always for the best interests of both, and he had at the same time to carry to completion a severely logical arraignment of Blackstone's theories of law. The enthusiasm of the moment was difficult to keep up in the face of stony opposition and long-continued discussion.

Thus, though four months later (September 12th) he was writing to his brother: 'Now my book hastens to completion, I shall require an amanuensis to transcribe it for the press', the letter in general indicates a gloomy and depressed state of mind. 'Even the thoughts that give me the greatest pleasure at the instant of their production ', he says, 'as appearing new and of importance to my darling project, grow insipid to me and even nauseous after having been brooded upon for a certain time.' * He had even quarrelled with Lind in a fit of moodiness, and concluded a letter to him about this time with: 'My wish is not to hear from you until you have heard from me again.' † A letter to Jeremiah Bentham in Paris, October 6th, shows a deep gloom with only a momentary flare-up of agitation at broaching the subject of marriage again. It ends: 'Shall I make any answer, Sir to the latter part of your letter? Prudence whispers, no—

* Ibid., p. 357. † Ibid., p. 355.

Could I but swallow my affliction, sunshine might possibly succeed this last storm, as it did the first. Shall I? Yes, I must speak; Prudence will not always be listened to by an ulcer'd mind. No. I will forbear. I will take another chance; since my congratulations on the happiness of your situation (God knows they were sincere!) and my filial wishes have been so unfortunate. Let me acquaint you then, Sir, that I have not the least thought of marriage at all without a full assurance, of what in my own judgment shall be a comfortable subsistence. Whether my own judgment and yours may agree upon what is a comfortable subsistence, I know not: if not I see no help for it. Let me assure you of this also, that in point of appetite I am as cool as any anchorite could wish to be: but which does not in the least alter however my way of thinking. I am, Sir, and will be as long as you will permitt me to be your dutiful and truly affectionate son.' * A letter to Sam on the same date ends: 'How happy it is for man, that tyranny extends not beyond the grave!' †

By December, Bentham, who was anything but a solitary or gloomy person by temperament, had reached a depth of unhappiness which made almost necessary the sympathy and friendship which Lind's society had always meant to him. Though still conscious of a misunderstanding, and perhaps unable to clear it up, and weary to death of the whole confused affair that his life seemed to have become, he tried as well as he could to get back on the old footing with Lind. 'There was a time', he wrote, 'when I doubted whether, so long as you were alive, I could live without you. It became necessary for me to try. I have tried and I have succeeded. I cannot write. I could not say anything without saying a great deal: and the subject is become stale and wearies me to think of.

'However I fancy now and then that I should like to see you: and in that intent I called about three weeks ago, as perhaps you heard. Since then I have passed ten days at Chatham: on my return yesterday sennight I found your name upon my table. I have from that time been intending, and intending still to call upon you; waiting, as it were, for an impulse which perhaps may never come. Least it should not, I have made an effort and written thus much to you. You often come close almost to my door: you know my hours: If you should happen to think it

* Add. MSS. B. M. 33537, p. 367. † Ibid., p. 366.

worth your while to call again, I shall at any time be glad to see you. My Compliments to Mrs. Lind.' *

Thus the year 1775 came to an end with the two friends together again, with the *Comment on the Commentaries* virtually completed, but with Jeremiah Bentham set as firmly as ever against the marriage. It is not unlikely that Miss Dunkly was losing interest in the affair, if not actually affronted, for Bentham in a letter to his brother says that he has not heard from her for a good while.†

The *Comment* being almost finished, Bentham went back to consider a point which Blackstone, copying Burlamaqui,‡ had inserted in his discussion of municipal law. This had to do with the nature of sovereignty, and as Bentham considered that it had little to do with the treatment of municipal law, he had at first passed it over with very brief notice. He now examined it more closely. 'I sat down', he says, 'to give what I intended should be a very slight and general survey of it. The farther, however, I proceeded in examining it, the more confused and unsatisfactory it appeared to me: and the greater difficulty I found in knowing what to make of it, the more words it cost me, I found, to say so.' § In short, having completed the criticism of Blackstone's introduction, a digression was entered upon which was treated at length and became the *Fragment on Government.*

'When it was nearly completed', he explains in the Preface to that work, 'it occurred to me, that as the digression itself which I was examining was perfectly distinct from, and unconnected with the text from which it starts, so was, or so at least might be, the *critique* on that digression, from the *critique* on the text. The former was by much too large to be engrafted into the latter: and since if it accompanied it at all, it could only be in the shape of an appendix, there seemed no reason why the same publica-

* Ibid., p. 371, Dec. 9, 1775.

† Add. MSS. B. M. 33538, p. 1, Feb. 8, 1776.

‡ Noted by G. P. Macdonell in *Dict. Nat. Biog.*, article *Blackstone.* Cf. Burlamaqui, *Droit de la Nature*, part 1, chap. 8, with Blackstone, i. 47–53. Macdonell says Blackstone used Nugent's translation published in 1748. Blackstone's page 44 of volume i is taken almost *verbatim* from pp. 78–9 of Nugent's translation. There are also interesting parallels with Nugent's translation of Burlamaqui's *Political Law*, pp. 8–97.

§ *Fragment on Government*, Preface. Montague's edition, p. 97.

tion should include them both. To the former, therefore, as being the least, I determined to give that finish which I was able, and which I thought was necessary: and to publish it in this detached manner, as the first, if not the only part of a work, the principal and remaining part of which may possibly see the light some time or other, under some such title as that of "A COMMENT on the COMMENTARIES".' *

Nowhere in Bentham's writings or correspondence is there ever again a mention of the *Comment on the Commentaries*. Just why the book should have been put aside after having been worked on for a year and a half can be only a matter for conjecture. For one thing, the need to be a professional writer seems to have passed. We find Bentham talking cynically of giving in to the Q[ueen] S[quare] P[lace] projects (he generally referred to his father as Q.S.P.), marrying £30,000, and coming in to Parliament.†

Or he may have felt, even as early as 1776, that his work lay rather with 'law as it ought to be' than with Blackstone. That his conception of an integral system of laws was already clear in his mind a study of the present work will show. To this system the *Elements of Critical Jurisprudence*, his next important work, was intended as a general introduction. Among the fragmentary memoranda in the MSS. of the *Comment on the Commentaries* is one sheet reading:

Advertisement
Upon the Anvil
By a hand concerned in the present publication
The Elements of Critical Jurisprudence
Commencing with the Penal Branch of it.

II

In the year 1758 William Blackstone was elected as first professor on the newly established Vinerian foundation at Oxford, and began at once the series of lectures which formed the basis of his *Commentaries*. In 1763, Jeremy Bentham, who had taken his B.A. in that year and had begun to eat dinners in Lincoln's Inn, returned to Oxford to attend Blackstone's lectures. Though but sixteen years of age, he heard them, for the most part, 'with

* *Fragment on Government*, Preface. Montague's edition, p. 98.

† Add. MSS. B. M. 33538, p. 5, Letter to Samuel, Feb. 22, 1776.

rebel ears', detecting, as he thought, several fallacies in Blackstone's reasoning.*

The *Commentaries* appeared in four volumes between 1765 and 1769, and immediately met with general applause. They represented the first attempt to give an analysis of the laws of England in a form suited to the man of affairs as well as to the legal student. Gibbon's comment that 'Mr. Viner's benefaction is not unprofitable, since it has at least produced the excellent *Commentaries* of Sir William Blackstone' is typical of the widespread interest they provoked. Even Bentham admitted that Blackstone 'first of all institutional writers has taught Jurisprudence to speak the language of the scholar and the gentleman '.†

The first serious attack on Blackstone came from Drs. Joseph Priestley and Philip Furneaux, who were up in arms against his treatment of religious dissent. Blackstone, in his answer to Priestley's 'angry pamphlet', maintained his original position with the statement, 'I must beg leave to inform Dr. Priestley, since it seems he is yet to learn it, that *non-conformity* is still a crime by the laws of *England*',‡ but in his second edition of the *Commentaries* he made certain changes in the passages complained of. Bentham's remark, 'They have made him sophisticate: they have made him even expunge: but all the Doctors in the world I doubt, would not bring him to confession',§ may be unfair, but it indicates that not only to Unitarians did Blackstone seem to range himself with the party opposed to change of any kind and satisfied with things as they were. 'Correspondent to discovery and improvement in the natural world is reformation in the moral' is Bentham's creed as stated at the time, and to this creed the easy optimism of Blackstone was a direct challenge. Impatient as Bentham was with what seemed to him the anomalies and absurdities of law as it was, the *Commentaries* were chiefly objectionable because, on account of their tremendous popularity, they bade fair to fix the law in its then state.‖

Bentham intended, in the *Comment on the Commentaries*, to de-

* See *Works*, x. 45, for his account of the lectures.

† *Fragment on Government*, Montague's edition, p. 116.

‡ *An interesting appendix to Sir Wm. Blackstone's Commentaries on the Laws of England*, p. 40.

§ *Fragment on Government*, Montague's edition, p. 103 note.

‖ See *Fragment on Government*, Preface.

prive Blackstone of as much of his authority as he could, thus furthering the cause of reformation. His plan was to take the second and third introductory sections of the *Commentaries*, those Blackstone had entitled 'of the Nature of Laws in general' and 'of the Laws of England', and by demolishing them to lay the whole work under suspicion. His original plan had divided the second section, 'of the Nature of Laws in general', into eight headings or chapters, corresponding as follows to pages in volume one of the *Commentaries*: 'Law in general', 38–9; 'Law of Nature', 40–1; 'Divine Law', 42; 'Connection of Laws', 43; 'Law of Nations', 43; 'Municipal Law', 44–53, including as a digression the 'Fragment on Government', which discusses pages 47–53; 'Parts of a Law', 54–8; 'Interpretation of Laws', 59–62. The digression called 'A Fragment on Government' he later detached and published separately, as he explains in the preface to that work; the *Comment on the Commentaries*, apart from that subtraction, stands as originally planned. The third section of Blackstone's introduction, entitled 'of the Laws of England', had divided the law of England into two kinds, the unwritten, or common law; and the written, or statute law, taking them up in the order named. Bentham, for reasons of his own,* reverses this order, so that the ten chapters which are comprised in his treatment of Blackstone's third section, 'of the Laws of England', correspond as follows to pages in volume one of the *Commentaries*: 'Statute Law', 85–7; 'Construction of Statutes', 87–91; 'Common Law', 63–7; 'Common Law, Division into Customs and Maxims', 68; 'Common Law. Judicial Decisions', 69–71; 'Common Law, Reports and Treatises on', 72–3; 'Common Law—Roman Law, how far consented to by the people?', 74; 'Common law. Particular Customs', 74–5; 'Common Law. Particular Customs—Rules', 76–9; 'Common Law. Particular Laws', 80–4. Blackstone's two sections, covering fifty-four pages, were thus treated to a comment of more than three hundred pages.

Bentham, speaking of the *Comment on the Commentaries* in the preface to the *Fragment on Government*, explains why he followed this particular plan of attacking the *Commentaries*. 'It would have been in vain', he says, 'to have thought of travelling over the whole of so vast a work. My design, therefore, was to take such a portion of it, as might afford a fair and adequate speci-

* *Comment on the Commentaries*, p. 125.

men of the character and complexion of the whole. For this purpose the part here marked out would, I thought, abundantly suffice. This, however narrow in extent, was the most conspicuous, the most characteristic part of our Author's work, and that which was most his own. The rest was little more than compilation. Pursuing my examination thus far, I could pursue it, I thought, as far as necessary for my purpose. . . . If *Hercules*, according to the old proverb, is to be known *ex pede*: much more thought I, is he to be known *ex capite*.'*

Blackstone had opened his discussion of 'Law in general' with what is essentially a theological dissertation on the nature of the universe, in the course of which he uses the term 'law' in several senses. Bentham objected that Blackstone had in no place given a satisfactory definition of his chief term, law, but he concentrated his attack on the point of free will. His contention is that Blackstone had placed himself in a logically absurd position by saying that man is 'necessarily subject to the laws of his creator', and that 'it is *necessary* he should in *all* points conform to his maker's will', when at the same time there were everywhere complaints, especially in the law courts, that this will was not conformed to. Bentham was not particularly interested in the controversy on free will and necessity, nor trying to establish a theological position, but he was trying to show that Blackstone's words were either meaningless or absurd. This method he follows throughout the work, with the avowed intent: 'To do something to instruct, but more to undeceive, the timid and admiring student:—to excite him to place more confidence in his own strength, and less in the infallibility of great names:—to help him to emancipate his judgment from the shackles of authority.' †

Blackstone's theological dissertation continues with a consideration of the law of nature. Human reason, he says, has been enabled to discover certain eternal, immutable laws of good and evil, among which he cites Justinian's three general precepts: 'that we should live honestly, should hurt nobody, and should render to everyone his due'.‡ Bentham (after pointing out that Justinian's *honesti vivere* did not mean *to live honestly*, but to follow decorum, whatever decorum meant to Justinian) finally

* *Fragment on Government*, Preface. Montague's ed., pp. 96–7.

† Ibid., Montague's ed., pp. 240–1.

‡ I Comm. 40.

sums up the second and third principles as meaning 'we should not give pain except when we ought, and render to everyone what we ought to render him', and concludes 'The other would, I fear, make it full as puzzling to us to find anything in this sagacious precept that could serve a man as a rule'.*

In the discussion of divine or revealed law, Bentham tries to show the difficulties inherent in an attempt to separate the ceremonial part of Mosaic law from what English theologians would accept as authoritative divine law at present, and finally makes a few observations 'calculated', as he says, 'to show the impropriety of mixing theology with either jurisprudence or morality'. The only thing theology can do for law, in his opinion, is to furnish, not a precept, but a sanction. As he expresses it in another place: 'If a man's fingers itch to committ murder, there are three sorts of motives (or of *restrictives*, if the term please better) proceeding from three different sources, that may contribute to prevent him: the fear of being damned for it, . . . the fear of being hated for it, and the fear of being hanged for it.' † The first of these he calls the religious sanction, the second the moral sanction, and the third the political sanction.

After a few animadversions on the Law of Nations as explained in the *Commentaries*, Bentham passes to a consideration of municipal law, which it is his opinion was the only law with which Blackstone had any occasion to deal. Municipal law according to Blackstone 'is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong'.‡ This definition he explains word by word, and to his definition of every word Bentham objects. Bentham's main objection, however, is to the term 'prescribed', for common law is included in municipal law. 'As to Common Law', he asks, 'where is it prescribed? How can it be prescribed? What is there in it to prescribe? Who made it? Who expressed it? Of whom is it the will?' In the idea of prescription is included the idea of notification, always a sore point with Bentham where the common law is concerned. The manner of notification to the people Blackstone thought a matter of great indifference. 'It may be notified', he says, 'by universal tradition and long

* *Comment on the Commentaries*, p. 40.

† Ibid., 55, cf. also p. 79.

‡ I Comm. 44.

practice, which supposes a previous publication, and is the case of the Common Law of England.'* 'This Common Law of England then', says Bentham, 'is "notified" sufficiently, the "tradition" of it is as "universal" as he would wish it. If he means this, one may believe him. In the meantime, who is there that knows it? nobody, but a few lawyers. It is well if *they* do. But whether it is known in any more effective manner, is to him "matter of great indifference". This may be: tho' to a Lawyer it is charity to suppose it: but to the people, that it is not better notified is a "matter of great" and well-merited complaint.'† 'He tells us', Bentham comments further, 'of Caligula the Roman tyrant, who hung up his Laws "in a small character" (*but who hung them up*—remember this ye Legislators and ye hoarders up of unpublished judgments—but he hung them up) " upon high pillars the more effectually to ensnare the people".'‡

We touch here upon one of the chief points of disagreement between Bentham and Blackstone. Blackstone's admiration for the common law, inherited from Coke, who had termed it 'summa ratio', was objected to by Bentham at length in the second part of the *Comment*, but already we see the fundamental difference between the two men suggested.

Law, according to Bentham, is the expressed will of one who has the power of punishing the non-conformity to that will. If a custom is obligatory at common law, it is because some judge has announced his determination of punishing whoever does not observe the custom. Such an announcement is not the declaration of a law already in existence, but a making of law; consequently the judge has usurped the function of the legislator.

Blackstone's answer to this would probably be that the judges never legalized a custom unless it could be shown that it had always been used; and that in consequence, instead of the judges expressing their own will, they were merely giving effect either to the will of the creator as given in revealed law and ascertained by right reason in natural law, or to the will of the people as shown by their immemorial usage.

This disagreement was of course not a new quarrel, but the old one between what have come to be known as the historical and the analytical schools of lawyers. If Blackstone met with

* I Comm. 46.

† *Comment on the Commentaries*, p. 68.

‡ Ibid., p. 69.

the censure of the analytically-minded Bentham, so had Coke been censured by his younger contemporary, Thomas Hobbes, nearly a hundred years before, and the quarrel was to descend to the nineteenth century with Austin and Maine.* Hobbes, writing in 1681, takes up the ' analytical' position in his *Dialogue of the Common Law*: 'Now as to the authority you ascribe to custom, I deny that any custom of its own nature can amount to the authority of a law.'† This is essentially the position taken by Bentham that ' to prove the existence of a practice is one thing, to prove the expediency of establishing it by force of law is another'.‡ Case law, as well as custom, both Hobbes and Bentham held not to be law. 'It is not wisdom, but authority', says Hobbes, 'that makes a law. . . . I suppose that he Coke means, that the reason of a judge, or of all the judges together without the King, is that *summa ratio*, and the very law: which I deny, because none can make a law but he that hath the legislative power.'§ 'By Law authoritative', says Bentham, 'I mean an assemblage of words purporting to express the will of a Legislator, and by express declaration delivered by him for such.'

The 'historical' lawyer may not go so far in his admiration of the common law as to assert with Coke that 'nothing is law that is against reason', *nihil, quod est contra rationem, est licitum*,‖ but at least he will agree with Blackstone that common law is the chief corner stone of the laws of England—'general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.'

From this view of the nature and value of the common law Bentham strongly dissents, and it is to make clear why he dissents that he devotes more than one half of the *Comment on the Commentaries* to an analysis of Blackstone's presentation of the *leges non scriptae*.

* Holdsworth, *A History of English Law*, v. 478–85, for an interesting account of Hobbes's attack on Coke, and Matthew Hale's able counter-attack on Hobbes in defence of the common law. Hale's MS. work entitled *Reflections by the Lrd Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe* is printed in full, ibid. 500–13.

† Hobbes, *Works*, vi. 62.

‡ *Comment on the Commentaries*, 218.

§ Hobbes, *op. cit.*, 5.

‖ I. Inst. sect. 138.

In the section which treats of 'the parts of a law' we find the curious situation that the conservative Blackstone talks of natural rights almost in the tone which the American Declaration of Independence was to use later, and that Bentham, the champion of reform, denies their existence. 'Those rights then which God and nature have established', says Blackstone, 'and are therefore called natural rights, such as life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture.'* To this Bentham replies, 'I know that I am heartily glad of the aid of human laws to invest in me my life and liberty, needless as he may think it: that I do conceive my right to them very much strengthened by these same human laws: and that were it not for the said laws, I should be much puzzled to say what right I had to them at all.' As to the right of the legislator to abridge, he asks, 'Has the legislator or has he not *power* to declare what act *shall* amount to a forfeiture? If he has, what is the subject the better for this want of power in the legislator that so much stress is laid on? If not, what is to become of those laws that inflict loss of life or liberty for their sanction? That is, what is to become of the greatest part of all our laws?'† That the American and French revolutions did not change his views is evident from his well-known comment on the French Declaration of the Rights of Man in 1793: '*Natural rights* is simple nonsense: natural and imprescriptable rights, rhetorical nonsense—nonsense upon stilts.'

In this same chapter, 'the parts of a law', Bentham dismisses the difference made between *mala in se* and *mala prohibita* without much discussion, contenting himself with pointing out Blackstone's inconsistency in applying the terms. 'This is the first occasion', he says, 'of our hearing of the acute distinction between *mala in se* and *mala prohibita*: which being so shrewd and sounding so pretty, and being in Latin, has no sort of an occasion to have any meaning to it: accordingly it has none. Theft is here a *malum in se* as luck will have it. In the fourth volume and in the eight-and-twentieth and nine-and-twentieth

* I Comm. 49.

† *Comment on the Commentaries*, p. 79.

pages of it, it is a *malum prohibitum* merely, being there put in point blank opposition to murder with which it is here in company.'*

Blackstone, in his observations concerning the interpretation of laws, had given as signs to be used in exploring the intentions of the legislator 'the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law'.† Bentham endeavours to replace all of these by a single criterion which will satisfy all demands, namely, the *end* to secure which the law was designed. 'The end of the Law', he says, 'of which our Author says nothing: tho' it is a term so much more explicit than *spirit* and *reason*, the terms he has mentioned that came nearest to it. The end of the Law is the suppression of the supposed mischief that gave occasion to it, when it is a mischief: or the procurement of the benefit, when it is a benefit.'‡

From the interpretation of laws in general, Bentham goes directly to a consideration of statutes, explaining that it will be easier to treat the unwritten law when the nature of written law is understood. He examines Blackstone's classification of statutes at length, objecting, contradicting, and occasionally quibbling over a verbal nicety, but now and then suggesting a practical improvement, such as the indexing of statutes.§ It is interesting to note that neither in this nor in the succeeding chapter on the Construction of Statutes does he suggest any plan for a complete *code* of law. The most he says is: 'The method of consolidation has been happily adopted in a few instances and begins to get in use. The Law relating to one subject is gathered out of a number of Statutes in which it lay disposed and reduced into one: the correspondent Statutes or parts of Statutes it is gathered out of are then repealed.'|| Forty years later he would have used his own word 'codification' to include such a word as consolidation. He does, even in this place, suggest that the whole law should be rewritten, as he was to do again and again throughout his life, and he particularly censures legislators, as makers of the written law, for their wordiness, for their having mistaken prolixity for precision. Blackstone had referred to the Statute 14 Geo. II, c.6, where the words 'stealing sheep or other cattle' had been con-

* *Comment on the Commentaries*, p. 80.
† I Comm. 59.
‡ *Comment on the Commentaries*, p. 107.
§ Ibid., p. 134.
|| Ibid., p. 150.

strued by the judges to extend to nothing but mere sheep, as the general words 'or other cattle' were held to be too loose to create a capital offence. 'And therefore', he says, 'it was found necessary to make another Statute, 15 Geo. II, c. 34, extending the former to Bulls, Cows, Oxen, Steers, Bullocks, Heifers, Calves and Lambs by name.' Bentham's statement of this statute, framed as it should be, reads:

'To steal, or kill with intent to steal the whole or any part of an ox or sheep shall be felony without benefit of clergy. By "Ox" and "Sheep" are meant any animal of the respective species: however differenced by age, sex, or other circumstance.' 'The number of words in the two sentences proposed here', he says challengingly, 'is 46: in the two correspondent sentences in the Statute Book it is 628. The first more than thirteen times that of the second. And now (since something of boldness is necessary to him that would oppose abuses so inveterate) I here throw down my gauntlet: and challenge any lover of tautology to show me in the latter anything that can contribute to answer the purpose of it, and that is not in the former.

'From this short specimen it may be judged whether the occasion for most of our Author's rules be founded on the unalterable nature of things, or in remedial abuses: and whether the complaints that now and then are heard of the composition of our Laws are merely clamour. I have thought somewhat on the subject, and scruple not to avow this persuasion: that a decent attention, together with an adherence to the common modes of phraseology and not the technical, might reduce the whole compass of the Statute Law a proportion not very much inferior [i.e. 628 : 46] : of the Common Law in a proportion ten or twenty times as great.'*

After censuring the legislators for wordiness, Bentham returns to the attack on Blackstone. He felt that a great deal of the judge's power to 'make law' lay in his ability so to construe a law as to defeat the legislator's intent, and the word 'disregard' in the *Commentaries* particularly roused his anger. 'He teaches them the judges the most ingenious methods of supporting themselves in an usurped supremacy, and shows them how, to save themselves from the reproach of disobedience, they may call in fraud to cover it. . . . "But where some collateral matter", he

* Ibid., p. 143.

says, "arises out of the general words and happens to be unreasonable; then the judges are *in decency* to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by *equity*, and only *quoad hoc* to DISREGARD it." To "conclude", when it is thought convenient to conclude that the Legislators did not see a thing, not because the truth is so, but out of decency, rather than set your will openly against theirs: to pick and choose, to obey *quoad hoc*, to disobey *quoad illud*, to let this be "valid"; and make that be "void", such is the advice our Author gives you if you are a Judge. This is his notion of what is "decent": for my part I should talk no more of *decency*, if I taught men to "*disregard*" the Law that governs them, a Statute *quoad* anything.'*

One of the chief contributions of the utilitarian school to modern thinking has been that it has taught men to distrust the careless use of 'vague generalities', i.e. words such as *right*, *wrong*, *justice*, *duty*, *obligation*, *natural*, *unnatural*, *reasonable*, and *unreasonable*, to the use of which no very clear meaning is usually attached.† The method of attack is well shown here in the passage where Bentham analyses Blackstone's use of the word 'reasonable'. 'It will be of use', he says, 'if we can find a clue to the fallacy that runs throughout the paragraph. It lurks in the words "reason" and "unreasonable": and consists in supposing them to stand for something that is fixed and certain, and that all men are agreed about, and that it could be told by certain indications independent of opinion, whether a given course of conduct was reasonable or otherwise. This is not the case. A regulation lies before me. I look at it and pronounce that it is 'unreasonable': what is it that I mean by this? just this much and no more; that my reason, i. e. I myself, applying to it that faculty in me which is called reason, do not approve of it. I go farther. I cry out that it is 'manifestly contrary to common reason'—what mean I here? still no more than that it is what I readily and strongly disapprove of, conceiving at the same time that it will be equally disapproved of by most others. To confess that as against other men's opinions he has no warrant for his own opinion than itself, is what few men indeed will

* *Comment on the Commentaries*, p. 153.

† For Bentham's obligation to Locke see *Essay on Human Understanding*, Epistle to the Reader, p. 11 (6th edition).

bring themselves to admit so long as they can help it. Nothing is more shocking to man's pride, nor galling to his impatience. Yet this being the case, it were fit it should be understood; and that, use what expressions of positiveness we will, when all comes to all, reasonableness or unreasonableness is nothing but conformity or nonconformity to, at least can be decided by nothing but, opinion. The question here then is whose opinion shall be the standard? that of the Legislature, or that of the Judge? of him whose office is to *make* his Will be Law, or of him whose office is no other than to find out that will and carry it into effect?'*

The part of the *Comment on the Commentaries* dealing with unwritten law is somewhat technical and goes into much detail. Blackstone had divided the *leges non scriptae* into general customs, particular customs, and certain particular laws, and had given a number of examples to illustrate the operation of various rules and maxims growing out of these. These examples Bentham seized on with delight, contradicting almost every statement of Blackstone's, and basing his contentions on an examination of the origin, history, and usage of the particular instance in question. Blackstone's first list of examples covered the operation of general customs or the 'common law properly so-called'. 'This', he had explained, 'for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligations of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the chancery, the king's bench, the common pleas, and the exchequer;—that the eldest son alone is heir to his ancestor ;—that property may be acquired and transferred by writing; that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set

* *Comment on the Commentaries*, pp. 153–4.

down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.'*

'A judicious and instructive collection', is Bentham's comment. 'The misfortune is, that what he has said of the whole immediately before and after these examples, is, with respect to almost every one of them, palpably not true.' 'These are the specimens of which our Author scruples not to assure us, that "for their support" "they depend" "upon" an "usage" that is "immemorial".'† Then he sets out to show painstakingly, sometimes by reference to historical evidence, sometimes by citing Blackstone himself, that none of the examples can be comprised in the definition given of the Common law. He goes so far out of his way as to bring in certain rules for the expounding of deeds which Blackstone had formulated in volume two of the *Commentaries*, 'in order', as he says, 'to judge of the probability of their having so remote and sublime an origin as he has given them'. He suggests that if Blackstone had wanted really to help men to knowledge of the law he would have pointed out the dangers lurking for the uninitiated in 'heirs and assigns' and similar phraseology held necessary to render disposition legal—'words which were it not for that express appointment, which men are never told of, and a man must be a sorcerer to divine, would appear to carry quite another meaning than what is given them. . . . That these productions of knavery or pedantic caprice (it is not easy to say which) were invented by the Saxons, or that they are of any other than comparatively modern origin, is that of which the contrary, were it worth while, might easily enough be made appear. Be this as it may, these are what he should have given us, instead of a collection of shallow and insipid aphorisms, for which no one is the wiser.'‡ Nor is he any more disposed to allow the common law to have charge of inheritance, civil injuries, and penal offences, holding with regard to all of them that only explicit legislation can make law, and that in fact all these legal operations are controlled or affected by recorded statutes and decisions.

Blackstone had objected to the division which some had made of the common law into established customs and established

* I Comm. 68.

† *Comment on the Commentaries*, p. 160.

‡ Ibid., p. 164.

rules and maxims, on the ground that he took these customs and maxims to be one and the same thing. Bentham makes a careful analysis of the ideas involved both in 'custom' and 'maxim', partly in order to show Blackstone's confused thinking, partly in order to make sharp and clear his own distinction between a custom *in pays* and a *legalized* custom. This chapter shows Bentham's peculiar analytic ability in detail. 'Before all things', he says, 'we must ascertain the meaning of the words custom, maxim: we must learn to annex clear ideas to those terms. Of neither of them has any tolerable definition ever yet been given. For each of them we must endeavour to find out one, by a comprehensive and diligent observation of the objects to which they have been applied.'*

In order to attach a meaning to the word *maxim*, for example, he takes the maxim 'The King can do no wrong', and makes an imaginative reconstruction of the process by which it came into being, a reconstruction that suggests the usefulness of the method for other definitions. For him, definition comprised almost all the intellectual activities of man—observation of phenomena, analysis of processes, historical imagination, reasoning about relationships—all these were involved in arriving at a definition of a word which seemed to him vague and foggy as some one else was using it. One may be somewhat weary when he has finished the chapter on customs and maxims, but he does know what Bentham means by the two words.

In the chapter on judicial decisions Bentham challenges again Blackstone's use of the phrase 'contrary to reason'. In certain circumstances a judge is to be allowed to depart from a previous decision. The prior determination must be 'most evidently contrary to reason'.† 'To whose reason?' asks Bentham. 'To everybody's? No, that cannot be. For to the reason of the judges who pronounced it, it was most evidently conformable.'‡ Nor does it help matters to say the common reason of mankind, for there is no such thing. Even the opinion of the majority of mankind would be impossible to come at, and the judge, lacking a written text, 'the acknowledged work of a sovereign legislator', can only decide whether the prior decision is contrary to *his* reason, that is, to what he likes. Even if the judge be the fairest and least

* Ibid., p. 174.

† I Comm. 70.

‡ *Comment on the Commentaries*, p. 191.

prejudiced imaginable, the best he can do in the existing system, according to Bentham, is to do nothing.

And here, in the chapter entitled Roman Law: how far consented to by the people? we have a paragraph which probably has a topical reference. Lord Mansfield was much admired by Bentham at this time. His speech in the House of Lords in the Evans case, when he had declared that 'the common law of England, which is only common reason or usage, knows of no prosecution for mere opinions',* had marked him as being at least not opposed to 'reformation in the moral world'. Not only had Lord Mansfield shown liberality in matters of opinion, but he might have been thought to be attempting single-handed a reform of the common law by introducing into it equitable principles. He had shown a willingness, for example, to make very considerable modifications in the law of contract, basing his arguments on reasonableness rather than on precedent. In 1775, when the *Comment on the Commentaries* was being written, he had, in the case of *Atkins* v. *Hill*, virtually overturned the whole common law doctrine of consideration by asserting that any moral obligation was a sufficient consideration. 'Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration.'† Bentham, as has been said, admired Lord Mansfield, and it is quite possible that he had him in mind in his warning that reformation could come only from the legislator, that for the judge to attempt it would only make things more uncertain than ever. 'Should there be a Judge', he says, 'who enlightened by genius, stimulated by honest zeal to the work of reformation, sick of the caprice, the delays, the prejudices, the ignorance, the malice, the fickleness, the suspicious ingratitude of popular assemblies, should seek with his sole hand to expunge the effusions of traditionary imbecility, and write down in their room the dictates of pure and native Justice, let him but reflect that partial amendment is bought at the expense of universal certainty; that partial good thus pur-

* *An interesting Appendix to Sir Wm. Blackstone's Commentaries*, p. 152.

† I Cowper, 290. Cited by Holdsworth, *History of English Law*, viii. 28. See also pp. 26–9, and vol. vii. 19–20; 43–6 for an account of Lord Mansfield's innovations at common law.

chased is universal evil; and that amendment from the Judgment seat is confusion.'*

In this same chapter Bentham attacks a passage which Blackstone cites from Julianus as justifying the making unwritten law of equal authority with the written, when not contradicted by it. Julianus had reasoned [Ff. 1. 3. 32] that since the written law is binding only because it is approved by the people, therefore the unwritten laws, of which they had shown their approval by obeying them, should also be binding. Bentham lays bare the fallacy in this reasoning with his favourite weapon, definition. '"Where", says this Lawyer, "is the difference whether the people give their assent to a Law by suffrage, or by a uniform course of acting accordingly?" "Where", he might just as well have said, "is the difference between a free and a despotic government? Where is the difference between acting by coercion and acting spontaneously?"'

'The fallacy lies in the abusive application of the term "assent": in the giving to a uniform course of action according to a Law, after that Law is passed, and punishment threatened for the breach of it, that same name "*assent*" as is given to an express declaration of the party's will with the Law before its passing.'†

He also contradicts Blackstone's statement that 'it is one of the characteristic marks of English liberty, that our common law depends upon custom' by remarking dryly: 'Is the authority of the decisions of former Judges, is the authority of custom, if it must be called custom, a proof of freedom in the constitution of the Legislature, then is the constitution of France a free one. Nowhere else does Custom make a greater figure.'‡

Blackstone had considered at some length his second branch of the unwritten laws of England, *particular customs*, or the laws which affect only the inhabitants of particular districts, and had formulated a number of rules relating to the proof of their existence, their legality when proved, and the way in which they should be construed or allowed. His exposition of these particular customs Bentham treats in much the same way he had treated that of general customs, trying to show that Blackstone was unsound either in his logic or his history. Perhaps the best point he makes is that having to do with the origin of particular

* *Comment on the Commentaries*, p. 214.

† Ibid., p. 212.

‡ Ibid., p. 213.

customs. His contention is that, had local tribunals kept records of their proceedings, it would be impossible to find a local custom which would be held legal by Blackstone, with his rule, 'That, if any one can show the beginning of it, it is no good custom.' 'Customs bearing so hard upon the party burthen'd', says Bentham, 'as customs do that are relative to the succession to entire estates could never have been . . . in their origin spontaneous. 'Tis by the act of some local tribunal they must have been established.'* If the local tribunal had kept a record of all its proceedings, the first act establishing the custom would appear, and thus the custom would be invalid. He goes on to illustrate his position by an example from Littleton relating to the disposal of lands by will.

The chapter on particular laws is the least effective, and probably was never worked into final form by Bentham. The chief point he makes is one tending to reassert his conception of sovereignty. Accounting for the authority of civil law, he points out that law may be either *autographic*, that is, written by the sovereign authority, or *adoptive*, that is, borrowed from some foreign source, but owing its authority to the expressed will of the municipal sovereignty. His chief difference from Blackstone on this point lies in his desire that this adoption in the case of the civil law should be not tacit, but explicit, and that the law adopted should be published in complete form by the legislative authority. This comes very near, of course, to the idea implied in his later word, *codification*.

One can only regret that Bentham's failure to put the *Comment on the Commentaries* into final form for the press has left it without an effective conclusion or a general preface. The conclusion and preface to the *Fragment on Government* are, however, sufficiently general in nature to be almost as suitable for the *Comment* as for the *Fragment*.

What then, to sum up, is it that the *Comment on the Commentaries* has tried to do? What were Bentham's purposes in writing it? First, he wished to diminish the regard paid to Blackstone as a legal theorist, by showing that his philosophic ideas were confused and vague, and that the rules and maxims he had formulated or repeated were either inconsistent with each other, or were platitudes hardly worth uttering; by showing also that

* *Comment on the Commentaries*, p. 223.

his satisfaction with the existing state of affairs was based rather on his personal and professional prejudices than on a rational examination of the public good.

Secondly, he meant to indicate, at least by implication, that there is possible an entirely different conception of the nature and function of law from Blackstone's. Bentham saw law, as has been said, as the expression of a sovereign will, with which will the judges had nothing more to do than to see it carried out. The unwritten law he objected to because he thought it substituted the will of the judges for the will of the legislators, and also because the unwritten law, being impossible to be known by the subject, could produce only a state of uncertainty. Since he felt that certainty tended to render law a producer of happiness, in that a man knew what he could call his own, he always advocated a complete and easily accessible publication of the law in language which those who were to obey it could understand. This accounts for his sometimes almost pedantical insistence on definition—for his dislike for any word to which one could not attach a precise and permanent meaning.

He also brought to this new conception of law a new measuring-stick for its operations. In the *Fragment on Government* Bentham stated his fundamental axiom that 'it is the greatest happiness of the greatest number that is the measure of right and wrong',* he referred to the principle of utility, and even mentioned pain and pleasure,† but it is only in the *Comment on the Commentaries* that he states the utilitarian basis of law almost as clearly as he was to do in the *Introduction to the Principles of Morals and Legislation*, published fourteen years later. Blackstone had used as his criterion for a judgement *reasonableness*. Bentham's objection to this was that as a criterion one must have something different from the judgement itself, that all a man said when he pronounced a decision reasonable was, 'I like it.' 'Had our Author . . . instead of reason said utility', he asserts, 'he would have said something. He would have referred us for a foundation for our judgment, to something distinct from that judgment itself. He would have referred us to calculation founded upon matter of fact: future contingent utility founded upon past utility experienced. How have stood the stocks of

* *Fragment on Government*, Montague's edition, p. 93.

† Ibid., pp. 118, 121.

Pain and Pleasure upon such a disposition of things as the determination in question is calculated to bring on? this is the question, stated indeed in the most general and comprehensive terms, which a Judge ought to put to him upon the occasion of every fresh case. The answer it cannot be expected should be given here. To give the answer would be at once to delineate the whole scheme of what ought to be the Common Law. Let it suffice just to hint, that the answer ought to be the summing up the several pains and pleasures that are certain or probable to happen upon each side of the alternative that is proposed.'*

* *Comment on the Commentaries*, p. 192.

A COMMENT
ON THE
COMMENTARIES

SECT. I

OF LAWS IN GENERAL

'LAW' in general says our Author, 'is a rule of action—and it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey'.*

This is his definition—When a man gives us his sense of a word in a definition, what one expects is that he should stick to it: that in *that* sense he should always use the word, and in that only. Words are the dress which a writer puts his ideas into, for the reader to get acquainted with them. 'Hark ye me,' says he, 'whenever you see this word, you may take for granted this idea is o' the inside of it';—if after this he watches his opportunity when the reader's back is turned, takes the word up again, whips the first idea out of it, and puts another in it's place, how is it that his readers are to understand him? About as well as Dr. Brown's facetious story teller was understood who had 'a windmill that used to lay eggs and hatch young ones'. This producing a sort of stare—'Ah', says he, 'but you are to know when I say a *windmill*, I mean a *goose*'. I fear, many of our Author's windmills will prove Geese. | 2

Let us see what the ideas are that we are to suppose upon the carpet when the word Law makes its appearance: They are these. 1st that of a *superior* being. 2dly that of an *inferior* being. 3dly that of a something presented (that is, *said*)† by the first of them to the second, which something is called a rule of action. 4thly that of the obedience of the inferior: 5thly the inferior's being *bound*: which supposes the idea of a something which is to bind him to that obedience.

‡Whatever then we speak of by the name of Law has these 5 things, it seems, belonging to it. And there are several sorts of things our Author gives us to understand that we speak of by the name of Law. There are, for example, 'the Laws of Motion, of Gravitation, of Mechanics, of Optics',—the Laws a 'workman' gives the 'clock' he makes to say nothing of 'the Laws of Nature

* [Blackstone, I Comm.] 38.

† 'dictated' is the word in the next page.

‡ [Cancelled passage omitted here.]

Laws in General

I and of Nations'. A pleasant way enough of going to work is that the Author has found out for 'the supreme being' whom unless it had been to shew his piety he |3 might have been better employed than thus to trouble. Among others of this being's making are Laws of Optics. Among others that are given for Laws of Optics this is one: that the Angle of reflection *is*, say other men (*shall be* must our Author say to make it serve him as an example) equal to the angle of incidence. We now understand how this matter was brought about. Hark ye, (said the Author of nature once upon a time) hark ye, you rays. There are some surfaces you will meet with in your travels that when you strike upon them, will send you packing: now when in such case, this is what I would have you do: keep the same slope in *going* that you did in coming. Mind and do what I say: if you don't, as sure as you are rays it will be the worse for you: upon this the rays (finding they should get into bad bread else) made their bows, shrugged up their shoulders and went and did so.

'Let there be light and there was light.' This is all we are told of the manner of making light by Moses: but there was enough in it for Longinus to admire: Our Author is in possession of further particulars. The light it seems made a virtue of necessity and slunk into existence for fear of getting its bones broke. I question whether Longinus would have admired this way of making light.

In the same manner we may understand how Mr. Elliot makes his clocks go true: his way is to serve them as a choleric Papist serves his Saints: beat them if they won't do as he would have 4 them. |

But our Author, we will suppose, or somebody for him, rises to explain. There's room for it. 'There are Laws for Clocks' says he, 'that's true:' and there are Laws for Men. Men are bound by them and Clocks are bound by them. But you are not to run away and suppose, that Clocks are bound by their Laws as men are bound by theirs—there's a great difference: you shall see it presently. A Clock is 'governed by certain arbitrary Laws',* which Laws, it being one of those 'creatures that' (as I have told you) 'have neither the power to think nor to will, must' (whether the Clock go true or no) 'be *invariably* obey'd'.† The reason is plain. 'For its existence depends upon that obedience.' Did you

* I Comm. 38. † I Comm. 39.

ever see a Clock in your life that existed after it had struck *one* I
when it should have struck *twelve*? With a man it's quite another *Laws in General*
affair. A Man, being a creature endow'd with both reason and Free Will* is 'necessarily subject' to the laws that belong to *him*: he is '*inevitably* obliged' by them: 'it is *necessary* that he should in *all* points conform' to them: one sort of them is the 'Will of his maker'. This Will of the maker is called the Law of Nature. It is called indeed by a different name, that is part of it which is what is opposed to that part that goes by | this name: but that's 5
neither here nor there.

Another sort of Laws that a Man is bound by are those that human Legislators make for him: these too are said to *bind* him,† to '*compell* him', to '*oblige*' him. This being the case, he may '*choose*' tho' 'not easily' whether he will do or no what they bid him: for they do not make 'it impossible for him to' do otherwise: 'which is the strict' and proper 'sense of' binding or 'obligation'.

At the same time they are *not* conformed to—'tis what you have complaints of every day. Nothing can be more just than those complaints. I have made them myself. And now you are fully enabled to account for them.

Now it is to be hoped you understand compleatly the difference between the way a clock is *bound* and the way a man is bound? A clock does what it is bound to do '*invariably*' while it varies: a man does it '*necessarily*' and '*inevitably*': that is, he takes his '*choice*' and does no such thing. Lord help you if you don't know what the word *bound* means now. | Such is the Author's 6
account of Laws in general. Above we have given the *difficulties* in it that occur at first sight. This last is the *explanation* that offers itself at a second. It is so satisfactory that I was resolved to say no more about the matter and was e'en passing to another head. In the meantime it struck me that it would not be unedifying if we could by accident discover how the difficulties came to arise and how the explanation came to be wanted. Instruction marks the footsteps of *great men.*

There is one thing *our* great man could do: that is, read. There is another thing he could not do: that is, extract the spirit of what he read. It is with this Commentator as with so many other commentators: his appetite is better than his digestion.

Montesquieu he had read. Montesquieu had written upon

* I Comm. 39. † I Comm. 57.

Laws in General

I the same topic of laws in general in a manner about as intelligible tho' not quite so inconsistent. The errors of Montesquieu were the errors of an original genius struggling under the heap | 7 of confusion accumulated by his predecessors. A great part of this heap he has contributed to remove. The husks of Montesquieu are Dainties to our Author. The Englishman copied: but the Frenchman thought.* In Montesquieu he had found as follows. 'All beings have their Laws. The Deity has its Laws. The natural world has its Laws: the intelligences superior to man have their Laws: the Beasts have their Laws: Man has his Laws.' Spirit of Laws Book I, Ch. I. And again 'Man, as a material being is governed, like the other sorts of bodies, by Laws that are invariable: as an intelligent being, he violates without ceasing those which the Deity hath established.' Montesquieu had given his Definition of Laws: he had called them The relations that derive from the nature of things, which definition our Author not understanding, any more than anybody else, had passed over. Thus Montesquieu had defined them: I am sorry for it: he had given them no meaning: but not having given them a meaning, he had not given them meanings that were opposite.

* [A line is drawn through this sentence.]

SECTION II

LAW OF NATURE

LAW in general was the subject of so much of our author's speculations as we consider'd in the preceding chapter. 'Law in its most general and comprehensive sense', that is in that sense in which it is put to denote a certain real object, the same it is afterwards made to denote in a more confined sense, (viz. a certain kind of command with it's appurtenances) together with one knows not precisely how many sorts of non-entities besides. So much for our Author's speculations concerning Law in general. What is there to be learnt from those speculations? nothing. What is there to be understood in them? Nothing. What is to be concluded from them? Nothing. *Ex nihilo nihil sequitur.*

We now come to his account of 'Laws in their more confined sense'.* Laws in that sense in which they are applied to a set of imaginary objects, the assemblage of which composes that imaginary whole called sometimes by our Author by the name of the Law of Nature: sometimes, as it should seem, (for it is all conjecture) by some one or other of four or five other names, as the decoration of the sentence happens to require.† | 2

* I Comm. 39.

† These names are 'The Law of Nature: Laws of human Nature: The Laws of good and evil: The rule of right: The Laws of eternal justice: Ethics: Natural Law.['] The case is, that for greater precision's sake, in a science of which precision is the very life and soul, it seems to be a sort of rule with him never to call the same thing twice together by the same name. Synonymisms spring up like mushrooms in the fertile-hot-bed of our Author's brain. Why did he not write in verse? It can certainly be only from an undue deference to modern prejudices that our flow'ry Author condescended to tread the career of humble prose. Verse is what his oracles like those of the ancient sages, would have shew'd best in. Materials even less ample than those he has every-where raked together might be enough for a moderate man to make into a *Gradus ad Parnassum*; a flight of steps to carry him to Parnassus. He might have got better than a puisne seat upon that mountain. I question whether the ingenious Jesuit inventor of the useful implement I have spoke of would have sat above him. His metaphysical speculations [ins. 5] all, and many of his jurisprudential ones could not but have derived great benefit from this change of *air*. A certain author was taking the advice of a friend what to do about his book—'By all means', said the friend, 'turn it into verse.' 'Into verse? why so?' says the Author.

II *Law of Nature* Law of nature, that is of *human* nature: that *supposed* Law, which is *supposed* to have the *conduct* of human creatures for its *object*. 'Laws, in their more confined sense and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct: that is the *precepts* by which man the noblest of all sublunary beings, a creature endowed with both reason and freewill, is *commanded* to make use of those faculties in the general regulation of his behaviour'.

'Man', continues our author, ['] considered as a creature must *necessarily* be *subject* to the *laws* of his creator, for he is entirely a *dependent* being. A being *independent* of any other, has no rule to pursue, but such as he *prescribes* to himself; but a state of *dependance* will *inevitably oblige* the inferior to take the will of him, on whom he depends, as the rule of his conduct, not indeed in every particular, but in all those points wherein his *dependance* consists. This principle therefore has more or less extent and effect, in proportion as the superiority of the one and the *depend-*
3 *ance* of the other is greater or less, absolute | or limited. And consequently as man *depends* absolutely upon his maker for every thing, it is *necessary* that he should in all points conform to his maker's will.'

'This will of his maker is called the *Law* of Nature.'

Thus far our Author. Nothing can be more harmonious than this, were it but intelligible. The misfortune is that the leading words throughout this paragraph, the words necessary . . . sub-

'Why, because, then it will be verse,' says the friend, 'and now it's nothing.' Let me cite a precedent. We have Coke's Reports in verse. Why should not the same honour be paid to Blackstone's Commentaries. Let me at least recommend this pious office to some one or other of the 'long and illustrious train'* of his admiring pupils. One would think, the accuracy which is to instruct, was looked upon by our Author as incompatible with the ornament which is to allure: or else, neither daring nor knowing how to possess himself of the former, he turned aside after the latter. This is the most probable. The flaccid fopperies of Poetry and Rhetoric might flourish in the dank atmosphere his Commentaries first drew. Those who dare not *judge*, may venture to imagine. But the firm beauties of precision love a purer air. They grow not in those torpid and pestilential regions, where the grim spectre of superstition sits centinel over the foundations of moral science. Vain are his hopes who thinks to learn to see clearly in that gloomy circle, in which the first vow he makes at entering is to shut his eyes.

* See our Author's Discourse on the Study of the Law.

ject . . . laws . . . independent . . . prescribes . . . inevitably . . . oblige . . . superiority . . . dependance . . . depends absolutely . . . necessary . . . conforms . . . will of his maker, are absolutely devoid of meaning, at least of every meaning which does not serve to convey propositions that are manifestly false. If the 'Law of Nature' is 'the will of' man's 'maker' and the 'conforming' to that will 'in all points' is a matter that is 'necessary': if man is in a state of 'absolute dependance' upon his maker and the '*obligation*' an 'inferior' is under to 'take the will of him on whom he depends as the rule of his conduct' is '*inevitable*', this law (although there is no such thing) is in fact 'in all points' obey'd: '*necessarily*' and '*inevitably*' obey'd. There can be no use consequently in saying any thing about the matter: since, | whether we say much or whether we say nothing, '*every thing is as it should be.*'*

II *Law of Nature*

4

Of this complexion is the last of the two paragraphs we have reached. The first being more explicit, contains what is more manifestly false.† There are no such things as any '*precepts*', no-

* An observation made by our author upon reviewing the persecutions to which dissenters are by laws exposed for worshipping God according to their consciences. See Comm. IV.

† The wonder is, that the manifest repugnancy of our Author's propositions did not awaken him out of his dream. It would, one should have thought, any man who had been at all accustomed to examine into the import of the words employ'd by him. The wonder is the greater, as the fictitiousness of the 'precept', the 'command' in one case, and the reality of it in the other, is all that he could have, according to the account he gives us of the Law of Revelation to distinguish that from this.

The bold and inquisitive but irregular genius of the philosopher of Malmesbury touched still nearer upon the truth. He had got half way into the threshold, when the fascination of habit got hold of him and drew him back into error and confusion. 'And forasmuch as Law' says he, '(to speak properly) is a command, and these dictates as they proceed from nature are not commands, they are not therefore called Laws, in respect of nature, but in respect of the Author of Nature, God Almighty'. Hobbes, *de Corpore Politico* Part 1. ch. 4 S. 12. Hobbes acknowledged a revelation. He builds on the authority of scripture in numberless passages. How could [ins. 2] it escape him, that the only characteristic difference between the *Laws* that are to be met with in scripture and these '*dictates*' as he calls them 'of nature' is that the former, being really *commands*, *expressions* of so many *volitions* having visible and permanent *signs* of them still extant, are real Laws: the latter not appearing to be *commands*, by any *signs* we have of them, are not Laws: in short as proceeding from God, are nothing: as proceeding from man, are expressions of the *judgment* of him who happens to propose them.

II thing by which man is '*commanded*' to do any of those acts pre-
Law of Nature tended to be enjoined by the pretended law of Nature. If any man knows of any let him produce them. If they were producible, we should not need to be puzzling out the business of 'discovering' them, as our author soon after tells us we must,* by the help of reason.

'This will of his maker' continues our author,† 'is called the Law of Nature. For as God when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of
5 life, | he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.' As to the laws themselves one should suppose by this, they were given him into his hand. In a line or two however we shall find that it is the laws themselves too that reason is to discover. If so, it is in the regions of non-entity she must discover them.

One more paragraph as harmonious and as edifying as the preceding: at the end of it however we begin to come a little to particulars.

'Considering the creator only as a being of infinite *power*,' continues our author, 'he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded on those *relations* of *justice*, that existed in the nature of things antecedent to any positive precept.' Nay, our Author might have said, he has been wiser still: he has laid down, in this way at least, no laws at all. Our author has not done justice to his wisdom. 'These' con-
6 tinues our author, 'are the | *eternal, immutable laws of good and evil*, to which the *creator himself* in all his dispensations *conforms*; and which he has *enabled* human *reason to discover*, so far as they are *necessary* for the conduct of human actions.' *Relations of Justice . . . Nature of things . . . eternal, immutable laws . . . necessary . . .* so many sounds without a meaning. But now we may expect something a little more solid: now we are come at last to particulars: now we come to some specific articles of this many-titled law. 'Such

* I Comm. 40. † I Comm. 39.

among others' continues our Author, 'are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of Law.'* 11 *Law of Nature*

Here then we have a sample of this same law of Nature: and a pretty large sample it should seem to be: since, according to Justinian, here is all of it. Indeed not only of *it*, not only of the Law of nature, but of everything else that is known by the name of Law: of what is called Municipal Law therefore among the rest: if '*Jus*' means Law. | 7

Thus according to our Author saith Justinian: and with Justinian our Author finds no fault. Not that he will allow it to be *all* neither: since there are '*others*', it seems, that he knows of. What these '*others*' are it would have been but charity in him to have told us. The trouble surely could not have been great: here are but three: more than as many again there could not surely be. So great, so wise an emperor as Justinian, an emperor whose words are oracles, surely could not have been mistaken more than half. It is the more to be regretted our Author has not given us the rest of them, as what he has given us are such as no mortal alive our author himself in particular, I dare answer for him can tell what to make of.

Of the 1st, viz: 'we should live honestly', as obvious a sense as any is we should do as we ought to do: which brings the precept or rather the doctrine to this incontestible one: what we ought to do we ought to do. This or 'we should not violate another's property', one or other of them, such as they are I take to be the meaning of 'we should live honestly'. If not, let him find out what *is*, | who is more fortunate than I am. 8

Not that 'honeste' which is Justinian's word signifies 'honestly' all this while, in any other vocabulary than our author's. In the mouth of Justinian who used it, honeste vivere signified, I should suppose, to live according to the rules of *decorum*: whatever according to Justinian's notion may have been decorum.

An explanation a little more precise of this precept, if it will admit of any explanation that is at all precise, may perhaps be this. According to what *Justinian meant* by it, it signifies to act *right* (that is what he who gave it us thought *right*) in matters

* 'Juris praecepta sunt haec', says Justinian, 'honeste vivere, alterum non laedere, suum cuique tribuere.' Inst. I. i. 3.

11 wherein other men's interests *are not* directly concerned: as by
Law of Nature abstaining from drunkenness, obscenities, and so forth. According to what *our author has made* of it it signifies to act *right* in matters wherein other men's interests *are* directly concerned: which gives it no imaginable distinction from the other two.

9 Of the second, viz: 'we should hurt nobody', the | sense, according to the best I am able to make of it is, either simply and without exception, that we *should not* give pain to any one at all; or else that we *should not*, i.e. *ought not* to give pain to any one but when we *ought*. Of these two interpretations the first would be apt, I doubt to make it rather puzzling to us what to think of several professions hitherto thought useful ones: for example, those of the Judge, the Surgeon, the Soldier, not forgetting the Hangman. The other would, I fear, make it full as puzzling to us to find any thing in this sagacious precept that could serve a man as a rule.

Of the 3d and last viz: 'we should render every man his due', the meaning, I suppose, is, either, that we ought to render him what we ought to render him, we ought to do, once more, what we ought to do; (for this edifying and instructive sense is all that belongs incontestably to any of them) or else that we should forbear to violate his property: that is, should forbear to deal with any thing which *the Law* (as I should call it, *the municipal Law* as
10 our author calls it) shall have declared | to belong to him, in a manner which the Law shall have commanded us not to deal with it. For how impossible it is that any thing can be a man's property but by virtue of this same municipal Law, has I hope
11 been made sufficiently apparent.* |

* [The following note in the inserenda seems to belong here:]

A discovery in Theology our author has made upon this occasion we ought not to miss paying him our acknowledgements for. A discovery I mean of three more attributes in the Deity than we have been used to hear of: to wit those of decency, honesty, and harmlessness. They belong to him incontestably, if it be true what our author says, that to the 'eternal laws' which enjoin these good qualities, 'the creator himself in all his dispensations conforms.' Our author, who not knowing very well what else to give us seemed resolved at least to give us a decent sermon, has sought everywhere to atone by the exuberance of his piety for the defects of his penetration. He seems to suppose more merit than I must confess I am able to perceive, in spending his time in paying compliments to the Deity: Of these compliments that which consists in attributing to him a disposition 'to render to every man his due', is indeed con-

'But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be attained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance its inseparable companion. As therefore the creator is a being, not only of infinite power and wisdom, but also of infinite goodness, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to enquire after and pursue the *rule of right*, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice | with the happiness of each individual, that the latter cannot be attained but by observing the former; and if the former be punctually obey'd it cannot but induce the latter.* In consequence of which mutual connection between justice and human felicity, he has not perplexed the *law of nature* with a multitude of abstracted rules and precepts, referring merely to the *fitness and unfitness of things*, as some have vainly surmized; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own happiness". This is the foundation of what we call *Ethics*, or *Natural Law*. For the several articles into which it is branched in our systems, amount

II *Law of Nature*

12

formable to the settled *etiquette*. But as to the rest our author seems to have adopted the stile of sentiment of the wild American speaking of his friend the Frenchman, 'In short,' said the Savage, summing up in one sentence the whole substance of the panegyric, 'in short,' says he, 'he is one of us.'

* [In the first rough draft of this chapter, Bentham commented as follows on this passage:]

This being the case, happy we most certainly all are, whether we know it or no, unless 'punctually obeyed' be something very far short of 'necessarily conformed to'. Strange indeed it would be, were it otherwise, since when all comes to all, this same puzzling sort of Law, of which so little a while before, there was no knowing what to make, amounts to no more than this one precept instead of the three we had before, viz: 'that man should pursue his own happiness'. Now one may venture to appeal to any one that lives and breathes whether there ever was or ever will or can be a man who could do otherwise. That we were destined to pursue happiness wherever we think we see it, is what we pretty well knew some time before our Author told us. But what we have heard now for the first time and what our obligations to him for are unquestionable is that it is but to 'pursue' and catch.

11 to no more than demonstrating that this or that action tends to
Law of Nature man's real happiness, and therefore very justly concluding that the performance of it is a part of the *Law* of *Nature* or on the other hand, that this or that action is destructive of man's real happiness, and therefore that the *Law of Nature* forbids it.'*

I have made so many fruitless efforts to catch at the sense of this smooth string of unmeaning periods, that I must absolutely
13 give up the attempt. A supposition it seems to set out with | is curious enough: tho' of what use it can be here or any where is more than I can imagine. He seems to put a supposition, that mankind were divested of self-love: meaning I suppose of sensibility, of the capacity of receiving pain and pleasure. On this supposition, he supposes that 'a *part* of mankind' would have rested in ignorance, not that this same self-love is so necessary as one might imagine: for another part he seems to suppose, might go on without it weaving 'a chain of metaphysical disquisitions'. In that case what should serve them for a motive to that employment or to any other, is, I confess, more than I am able to comprehend. He next seems to do as much as intimate, that there is no way of being *happy* (human Laws we are to remember being all this while out of the question) than by being *just*: and that no man can be just without being happy. As to this matter I should be very glad to see him make his words good; that I might move for shutting up Westminster Hall, and for throwing all Law-Books into the fire. But what purpose it can answer to advance an insipid observation contradicted by the experience of every instant, is more than I can see, unless it be to bring moral lessons into discredit. If I might have liberty to make suppositions, I should suppose, this to have come of his having got by heart when at college, the notable aphorism retailed by *Cicero* from the *Stoics*, that 'Pain is no evil'; together with other choice morsels out of the same kitchen, with which young Academics are dieted by their tutors. He then seems to give us to under-
14 stand, that the precepts of the Law of Nature | are not a multitude, tho' but the paragraph before, he had told us of a multitude there was of them, and that indefinite: for he now finds that the whole of it is but one precept: and this one he perceives to be the foundation of itself. He then seems to have discovered that the articles a 'precept' is composed of are '*demonstrations*' and '*conclu-*

* I Comm. 40.

sions'; also that a '*performance*' is 'part of a Law'. Besides this he seems to please himself with the thought that the precepts of the Law are not '*abstract*': not knowing what 'abstract' means: he seems to have meant by it *unintelligible*: but if this be his meaning, I doubt he is under a mistake: for they seem perfectly '*abstract*', at least as he has given them. Upon this occasion he also seems once more to be veering pretty strongly towards his old notion that 'every thing is as it should be'. For 'the Law of Nature' is 'reducible' he says 'to one . . . precept' 'pursue your happiness': a precept which ever has been and ever will be most unquestionably obey'd. Meantime he quarrels, but I can't tell why with 'the fitness and unfitness of things': while their old associate the '*rule of right*' is in high favour with him. This I think is hardly fair: jargon against jargon, I cannot see why one of them is not as good as another.* 11 *Law of Nature*

| In fishing after our Author's meaning in this paragraph, I have all along spoken with extreme diffidence: I would wish to be understood so to speak on the occasion of most other paragraphs I may come to: for to pretend to be satisfied for any number of periods together about our Author's meaning, is a pretension of all others I should never think of making. 15

Towards the close of the paragraph however, I must confess I could not help trembling for our author. It was at seeing [him] within arm's length of departing entirely from his character, and advancing a proposition that would not only have been intelligible, but fundamentally important, and unquestionably true. That it may be seen how near he was stumbling upon this adventure, I will here give his two last periods: the alterations that would serve to bring them under the predicament just-mentioned, printed in *Italics*. 'This is the foundation of *what may be* called *Critical Law or Critical Jurisprudence*. The several articles into which it *might be* branched in our systems amount to no more than demonstrating that this or that *mode of conduct* tends to man's real happiness, and therefore very justly concluding that the *observance* | of it *ought to be either commanded or allow'd of by* the Law of *the country where it has that tendency*: or, on the other hand, that this or that *mode of conduct* is destructive of man's real happi- 16

* Philosopher *Square* in Fielding's Tom Jones, was not thus capricious. Philosopher *Square*, it stands upon record, paid equal homage to them both.

II ness, and therefore that (*provided the mischief of enforcing the pro-*
Law of Nature *hibition do not exceed the mischief of the mode of conduct meant to be prohibited*) the *Law* of *the country ought to* forbid it.'

'This Law of Nature' continues our Author,* or, (to give it some signification he should have said, 'these conceits of *Grotius*, *Puffendorf*, *Woolaston*, *Burlamaqui* and *my own*') 'being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human Laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.'

With this pompous declamation closes our Author's account of this formidable non-entity, the Law of Nature, which by this time in spite of every thing that was hinted about if before, it seems, if we may trust what is here said of it, is become as *real* and as plain, as the nose upon a man's face. Indeed from the whole of what appears as well from what has been said by others, as from what has been said by our author concerning the phenomenon, it appears, I think, to be incontestably of the same genus with a certain production called '*zeal*', which according to the history given of it in the Tale of a Tub,† 'proceeded at first
17 from a *notion* | into a *word*, and from thence, in a hot summer, ripen'd into a *tangible substance*'.

* I Comm. 41.

† Sect. 6 p. 99 6th edit.

SECTION III

DIVINE LAW

WE now tread upon tender ground. No man so apt as our Author, when hard pressed, to grasp the horns of the altar, to rend his clothes, and cry out, profanation. In this he will do as he is advised. Sacred however as is the Divine Law, and the holy Scriptures that contain it, our author's account of it may be as mysterious, but is not quite so sacred.

'But in order to apply this' (meaning the Law of Nature) 'to the particular exigencies of each individual, it is still necessary' proceeds our Author, 'to have recourse to *Reason*; whose office it is to discover, as was before observed, what the Law of Nature directs in every circumstance of life; by considering what method will tend the most effectually to our own substantial happiness. And if our reason were | always, as in our 2
first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide than this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.' *

'This has given manifold occasion for the benign interposition of Divine providence; which in compassion to the frailty the imperfection, and the blindness of human reason, hath been pleased, at sundry times, and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The *doctrines* thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures.'

I pass over, as being far above my comprehension, this

* [The following passage from the first rough draft of this chapter may be of interest in this connexion:]

This all-embracing Law, 'dictated by God himself' who giveth wisdom to the simple, and 'inevitably conformed to' is a Law, that, we may easily perceive, remains to be 'discovered'. To discover it, is a thing that 's 'necessary': however there is a something or a somebody whose 'office' this is, and that is *Reason*: and Reason cannot discover it after all. How should she? she is 'frail', she is 'imperfect', and 'she is blind': as such she is the object of 'compassion' to 'providence', which not knowing how sorry it would be for it after it was done: made her so. And has since 'benignly

III *Divine Law* theological galimatias: in which the leading terms, 'Reason'—'discover'—'Law of Nature'—'directs'—'clear and perfect'—'passions'—'corrupt' |3 being unmeaning, communicate the same quality to the rest of it. Our author when he was about it, might as well have transcribed the first chapter of Genesis at full length. For the purpose of illustrating the Laws of England, or any other system of human laws the remainder, any or all of it might have been just as serviceable as what he has given us. [Pagination of MSS. begins anew.]

On this passage of our Author's book I shall make no particular comment: but in place of it I shall submitt once for all a few considerations calculated to evince the impropriety of mixing theology either natural or revealed with jurisprudence; and of natural in particular with either Jurisprudence or Morality: to show how absolutely unserviceable and indeed disserviceable the idea of God is for the purpose of solving any political problem, and to point out the absurdity of jumbling in the manner he has done, things sacred with profane.

I shall begin with natural Theology, which setting out with the supposition that there is no positive command, no will of God expressed by any ostensible instrument in the case, supposes however the will of God to be collected or at least collectible from inference, and then upon the will of God so collected proposes to determine what is politically right and wrong.

With natural Theology I shall begin, and endeavour to shew in a few words what helps it can not afford to Legislation, and what it may afford.

A help it can not afford is to point out in any instance the measures proper either to be taken or to be avoided. The reasons are very plain and obvious, if a man's fears and prejudices would permit him to observe them or to give them

interposed' many's the good time and oft, if possible, which was more than it knew, to make her otherwise. And this is she whom it is necessary 'to have recourse to' to apply this all-embracing Law 'to the particular exigencies' of the men it's made for; that is, to make it do anything that is wanted of it.

Time was, when things went otherwise with her: it was when she had her lodgings in the Pericranium of our first ancestor. She was then his 'guide': had we but had her in the same plight that he had, we should not now have need of any other. No passions then to 'ruffle' her, no 'prejudices' to 'cloud her', no 'disease' or 'intemperance' to 'impair' her: she was 'clear and per-

weight. A help it may afford when handled with propriety is to III
suggest motives to governors to adopt and to people | 2 to submit *Divine Law*
to such regulations as by other considerations shall have been
determined to be proper. In a word, what Natural Theology
cannot furnish is a *precept*: what it may furnish is a *sanction*.

Revealed theology is that which professes to teach what is called the Law of Revelation. The Law of Revelation, among Christians, is divided into two parts: the one containing the Law delivered by Moses; the other containing the Law, as it is called, delivered by Jesus and his Apostles.

The first of these, in the strict and proper sense of the word Law was once a Law. It was a collection of specific commands, delivered to a certain people expressed in certain terms, affecting specific *objects*, armed with specific penalties, which in point of fact did visibly and presently follow upon disobedience to the commands to which they were annexed.

The latter is rather a system of moral rules than a Law, and rather a history of transactions from which moral rules may be deduced, than either. The first was the Statute Law of a particular people called the Jews: the second is given as the Common Law of all nations. As well say, according to the Articles of our Church, | of those which have never heard of it, as of those 3
which have.

The Law of Moses we are told had originally, the whole of it, an original binding force of its own over the particular nation to whom it was delivered; and that as well in the character of an expression of the Will of their subordinate human Legislator Moses, as in that of an expression of the declared explicit Will of God. It has still, a part of it, a binding force, and that over all

fect': and so he fell into transgression. Happy our first Ancestor in such a guide!

'Every man now' it seems finds the contrary 'of all this in his own experience: his reason is corrupt, and his understanding full of ignorance and error'. And now one should think there might be some hopes of his not transgressing. A pretty picture enough of this our guide; which if not our only one, is at least the only one we have to introduce us to any other.

Let our Author meantime answer for himself; and let that satisfy him: his reason shall be corrupt, since he will have it so: his understanding shall be full of error, or anything of that kind that an understanding can be full of: it shall be full of ignorance, as soon as anything can be full of emptyness. He may promise the same felicity to anyone who thinks he gets instruction from books thus written.

III *Divine Law*

nations: for example, over our own: but this no further than as it may have been tacitly adopted by Jesus, himself a part of God, the most recent and authoritative announcer of the will of himself and what remains of God, and by the Apostles, interpreters of the Will of Jesus.

In this view again the Law of Moses is divided into two parts. The Ceremonial Law containing what is supposed to have been abolished by Jesus: and the Moral Law, containing what is supposed to have been adopted and retained. With respect however to this distinction, if we mean to speak ingenuously we must confess ourselves to have been left very much in the dark. Jesus has nowhere made any division of the Laws of Moses into two parcels and said of the one parcel this ye shall obey, and of the other this ye shall not obey, or may obey or not as ye think proper. Never did Jesus this: never did any Apostle. By no one
4 has it been ever | said they did. Not only is it true that neither by Jesus nor by any Apostle have respective parcels been anywhere ascertained, but no division into any such two parcels is anywhere expressly mentioned. Not even are the terms now employed to express the two parcels so much as alleged to have been mentioned by Jesus or by any Apostle, or any terms corresponding to them.

That which the Will of Jesus, and of the Apostles, interpreters of his Will is to be collected from, is the general aspect of their discourse towards the Law of Moses: now speaking in favour of it, and now in derogation. To speak now in favour now in derogation of the same whole, would savour, it seems to have been supposed, of levity and inconsistency. It would seem not to be the discourse of a Legislator, much less of a divine one. On this account, when it is in favour of this Law that they have been thought to speak, it has been of one part they have been thought to speak: viz. of the moral: when in derogation, of another part, viz. of the ceremonial. This distinction seems at first sight nothing more than what is necessary to reconcile what has been said of the Mosaic Law by these divine or divinely-commissioned Legislators, to our notions of that knowledge of human nature which teaches how to settle the purport of a Law, and of that knowledge of language which teaches how to fix upon the
5 expression. |

As to Jesus, we find him treating the Law itself with contempt,

and the adherents to it with ridicule.* This they say is the ceremonial part.† At another time we find the same Jesus declaring of the whole Law in general, that he came not to destroy but to fulfill it. III *Divine Law*

Of this Law, that which enjoined circumcision was a part Against circumcision Jesus has said nothing; and he himself was circumcised. For all this an Apostle scrupled not to say that neither circumcision availed anything, nor uncircumcision: while the same Apostle says in another place [blank].‡

Under these difficulties, theologians have been reduced to the necessity of settling the contents of the two parcels above spoken of, themselves; and of framing their own mark for distinguishing an article that belongs to one of them, from an article that belongs to the other. This mark, say they is the general or particular utility of the article, of the regulation in question. Coming from God they must all of course possess a certain utility, or at best a certain worth equal or superior to use. Every article then being useful, if *generally* useful to all who should observe it, of any other nation as well as of the Jewish, it is an article of the moral Law | and as such belongs to us who are never mentioned 6
by it, as well as to the Jews to whom it was delivered. If no utility can be found or supposed in our observing it, its utility is then of the special kind, and it belongs not to us, but belongs only, that is belonged formerly to the Jews.

This explanation being given, the doctrine comes to this, that with respect to such articles as are now useful, these it is now proper for us to observe, the same that might be said of a regulation made by any person for any other nation. But under this explanation how can any human Law be contrary to this part of the Law of God, unless in as far as it is contrary to utility: that is how can any man complain of such human law and argue for its being disobeyed for any other reason than that he thinks it inexpedient? And what would be the condition of society, if every man were hearkened to, who merely because he thinks a Law inexpedient, argues that it is void and ought to be disobeyed?

As to the notion of adopting the Law of Moses in its whole

* Quote.

† Note by the by this however is one of the articles we have thought fit to retain as part of the moral.

‡ Peter and Paul Meats. Unclean things. Blood.

III *Divine Law*

extent, even of those articles of it that are of the nature of political regulations, and in no wise concern the ceremonies of the Jewish religion this has been of late universally exploded by persons of all sects, in particular by writers of our own Church the most orthodox and the most distinguished for their attachment to religion. 'The people who composed the new colonies' (speaking
7 of America) it has | been observed by an historian of the first eminence* 'imitated the Jewish polity in almost all respects; and adopted the books of Moses as the Law of the Land.' This the Historian scruples not to speak of as being the effect of a 'contracted way of thinking and most violent enthusiasm'. 'The first laws which they made' (continues he) 'were grounded upon them' (upon the books of Moses) 'and were *therefore* very ill suited to the customs, genius or circumstances of that country, and of those times; for which reason they have since fallen into disuse.'

To this sort of discourse which is that commonly employed by the orthodox for accounting for and fortifying the present neglect of the Law of Moses, the sticklers for the universal and perpetual authority of that Law oppose arguments that are rather of a perplexing nature. They rejoin, that amongst the regulations thus reprobated in the lump, many it is true are of a local nature. Many the reason of which is plainly referable to the peculiar circumstances of the people they were given to. But many on the other hand, say they, are plainly of a nature not local: many such as have no more to do with the circumstances of that particular nation than of any other. These then if not 'well suited to the customs, the genius or circumstances of this country' in this age were not suited to the circumstances of any country in any age; were not well suited to the circumstances of
8 that country to which they were given | in the age in which they were given. This, of laws given by God himself, is what we must not suffer ourselves to suppose; well suited then to the circumstances of that country they were: well suited they now are to the circumstances of this. Not being expressly repealed by Jesus, they are therefore still in force. To neglect them is impious. Laws 'contrary to these' are, to use the words of our Author 'of no validity': 'ought not to be obey'd'.

* Account of the European settlements in America attributed to Mr. E. Burke. Vol. 2. p. 147.

Such are the inextricable difficulties in which those involve themselves who think to blend together things so dissevered as politics and theology and who propose to try the propriety of a political regulation by any other test than by that plain and luminous one, the principle of utility. To act consistently they must take this advice—they must be either Legislators altogether, or Divines altogether. They cannot be both at once. When in the Senate, they must either shut up their Bible or their Statute book. They must either give up the notion of drawing arguments from the scriptures; or that of directing their measures to the temporal felicity of the state. III *Divine Law*

The same observations nearly that have been applied to this more ancient part of the Law of Revelation may be equally applied to the more modern. It is equally incapable as the other, of answering the purpose of a guide in the work of Legislation. The principle of utility | once adopted as the governing prin- 9
ciple, admits of no rival, admits not even of an associate. To the dictates of this principle, then, in any case what is given for a dictate of the Law of Revelation is either opposite or conformable. If opposite what is given for the dictate of the Law of Revelation must be rejected; and all we get by our researches into the scriptures from whence we derived it is the embarrassment of either interpreting the passages in question perhaps against the most obvious import of the words so as to bring it to a conformity with the dictate of utility in that behalf; or of reconciling our persuasion of the authenticity of the Law with our perception of its repugnancy to utility. If conformable, that is of itself reason sufficient for adopting of the measure: that alone fully justifies it: and it were but lost labour to look for any other. Besides if we lay it down as a fixed principle that whatever Laws have been given by the Author of Revelation were meant by him to be Laws subservient to the happiness of the present life, that this subserviency is an indispensable evidence of the authenticity of what are given for such Laws, that is, of their really coming from him, to know whether a measure is conformable to the dictates of the principle of utility is at once the readiest and the surest way of knowing whether it is conformable | to the 10
dictates of the Law of Revelation.

The question concerning the truth of the sacred history in general is a very complicated and difficult question of evidence,

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and another very complicated and very difficult question in every case is whether the sense we put upon a given group of passages be the true one.

The question concerning the utility of a measure of government, of an article of conduct in the subject is a question of fact: Of a question concerning a matter of fact that depends upon experience, and is to be collected by observation.

[SECTION IV]

CONNECTION OF LAWS NATURAL, DIVINE, AND MUNICIPAL

THUS much for the Laws of Nature and Revelation: hapless the man that does not understand them now. These are our foundations. 'Upon these two foundations, depend all human Laws.' To find them placed on foundations thus solid and conspicuous, cannot but be matter of singular comfort and satisfaction.

Between these, the supporters and their old crony human or Municipal Law the supported, that we shall come to presently, there subsists as is natural to suppose, a very strict sort of intimacy: nor will the nature of that intimacy and of the terms they are upon with each other meet with an explanation a whit less satisfactory than the Laws themselves have had. A strict intimacy indeed, and so strong a likeness now and then, that when Municipal Law has got their livery on his back, as he commonly has when he is about his business, you would hardly know one from t'other. Not that poor Municipal Law makes any great figure in the groupe: the connection being altogether of the unequal kind, such as between Patron and Toad-eater of the lowest form: the amicitia inaequalitatis, as it is somewhere called,* | 2 this humble under-strapper feeding upon the scraps of obedience the others leave. A tight hand it is, indeed, they keep on him: so that when either of them thinks proper to be doing, all they leave for *him* to do is to come and tell what it is that *they* have done, seeing it's more than they can do themselves. 'With regard to such points that *are not* indifferent' (we suppose you, reader, to understand what *are*) 'human Laws are only declaratory of, and act in subordination to, the former.'

Upon this account of the matter what it has to do for them seems to be much the same as Mr. *Andrew* in the *Puppet-shew* does for *Mr. Punch*: say his good things over again for him, for fear any of them should escape the company: a good office which, as this last-mentioned facetious gentleman is apt now and then like

* See that invaluable quintessence of Moral Science, the Ethic Compend used at Oxford.

IV *Connection of Laws*

those we have been speaking of, to be troubled with a huskiness in his throat, is sometimes not much more than necessary.

And now gentle Reader, I, acting as Andrew to our Doctor, to make his bolus's work the pleasanter, will tell you a Conundrum. A cleverer one was never put into a Magazine. It's about Murder: and it lies in the word 'unlawful'. Now do you know, that
3 it's more than all the Kings in the world | could do, to make this Murder here unlawful? truly unlawful, do you mind me? if it was not that those two Laws you see above there have made it so already? You stare, I see: and yet it's true. 'To instance' says the Doctor, p. 42 'in the case of Murder: this is expressly | forbidden by the divine, and demonstrably by the natural Law; and from these prohibitions arises the true unlawfulness of this crime.' All the unlawfulness, therefore, that it has—'*the true unlawfulness*'—is what arises from their prohibiting it. It never could be at all truly unlawful but for them.

Unlawfulness (in an action) is the being *against Law*: in Murder as in anything else to be *unlawful*, is to be *against* Law. In Human Laws there is (suppose) an article against Murder. In those Laws there is (suppose) no such article. This being the case, Murder you are to understand is not unlawful: it is not against Law.

And here you have the conundrum. The puzzle is, which to give of two answers: that Murder is not, *when it is not*, against those Laws: or that it is not, *when it is*, against a human one. To make the matter clearer and that we may have the notion of unlawfulness at our fingers ends, he goes on and tells us, that 'those human Laws that annex a punishment to it' [viz. Murder] 'do not increase its *moral guilt*, or superadd any *fresh obligation* in
4 *foro conscientiae* to abstain from it.' | By moral guilt, speaking of a *sort* of action (for with respect to individual actions it may be otherwise) a man who is at the pains of asking himself what he means, means (I take it) *mischievousness*. To tell us therefore that a human Law does not increase the moral guilt of murder, is to tell us that it does not increase its mischievousness: which may be very true perhaps, were it but worth the telling. [New paging.]

As to its 'superadding any fresh *obligation in foro conscientiae*', to have such a bone to pick just now, is rather hard upon us. I have seen a discourse of a hundred pages written upon this same single word 'obligation', to find the sense of it. A work of some

repute and not wholly without its merit, except that it is rather of the largest, for what it had to do: being rather a Nutshell in an Iliad, than an Iliad in a Nutshell. To this let me recommend the reader, unless the few words we shall have occasion to say presently will satisfy him. IV *Connection of Laws*

| '*Forum Conscientiae*' is a Latin phrase, shews a man's learning, 2 and comes in very prettily, when he knows what he means by it. If *our Author* does, I give him joy. It's more than I do. What I know of the matter is this. If a man's fingers itch to committ murder, there are three sorts of motives (or of *restrictives*, if the term please better) proceeding from three different sources, that may contribute to prevent him: the fear of being damned for it, (no offense, I hope, to polite ears) the fear of being hated for it, and the fear of being hanged for it. Now | the fear of being 3 hanged for it is the fear that proceeds from the human Law (that is, the Law of the Country) having made it unlawful; having forbidden it under pain of hanging, having declared in short that he shall be hanged for it if he does it. Whether now these other fears only and not this are obligations *in foro conscientiae* is what I shall leave for those to consider further who think it worth their while. Obligare, to oblige, is latin for to bind. To bind a man to do a thing, is to make him do it: to be the occasion of his doing it: to hold him fast in such a manner from doing its contrary, that he does that.

As to the word *conscience*, and the use of it upon an occasion like this, we may have something more to say in another place. The next thing we learn is, that if we obey a Law that bids us *do* a thing, committ Murder for example, we disobey a Law that bids us not do it.*

The puzzle is to think what sort of Law this should be: I do not mean what probable, but what conceivable human Law it should be that should bid us committ Murder: I mean to those who know what they mean by Murder. Murder is the killing of a man without any alleviation, excuse, or justification for it: of which latter that of being bid or allowed to do it by the Laws is one. Where there is no such justification in the case, the Laws, meaning the Municipal Law, forbid the act, under a certain penalty of death as the case is and then the act is murder. Where there is, the Law enjoins it, or at least allows of it, that is either

* P. 43. 1. 2 'Nay, if any be—

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IV leaves it at a man's option whether he will committ it or no, imposing no penalty on him in either case, do as he will: or else imposes a penalty on him if he does.* This being the case, how a human Law should enjoin or allow him to commit murder is what I shall know, when I understand how it is that the same Law speaking to the same person at the same time can mean a
4 thing should *be done and not done.*† |

The matters here spoken of, if we want to know them are 'matters that are in themselves indifferent' (for this I passed over at the first that it might come in by way of explanation afterwards) such are those which are 'neither commanded nor forbidden by those superior Laws'. What one would wish to know, and what of all things I would not undertake to tell is what meaning the word indifferent as applied to actions has
5 with our author: the task would not be easy: for it is not easy | to tell what meaning a man has, who has none. But the meaning that all those have in it who have any is soon told. An action indifferent to society (if such there be) is an action that does *neither good nor harm in it*: or if that be not precise enough, that produces in it neither *pain* nor *pleasure*. Of this sort, meantime, be what it may, there are it seems 'a great number': which great number are all among those which it is found necessary for the benefit of society to restrain.

One thing therefore we find that is necessary to the good of Society, is, to forbid actions, (a 'great number' of them) that do no harm in it. This (if he had any) would be our Author's notion of the chief good that is to be done by human Laws. 'Herein' says he, 'it is that human Laws have their greatest force and efficacy.' p. 42. What it does no harm to do he would make us not do: what it does no harm *not* to do he would make us *do*. Exporting Wool to *foreign* countries is one of these acts that would do no harm to *this*; in consideration whereof he is perfectly content that exporting Wool should be forbidden. And with this lesson of Political Oeconomy we shall close the Section.

* It gives me concern to find myself obliged to tell our Author what Murther is: seeing that, had I the ill luck to be tried before him for it, it might be somewhat the worse for me, if he did not know. Not but that he might have understood it as well as most men, if confining himself to that Law with which he had to do, he had kept himself clear of the Laws Natural and Divine.

† I Comm. 43.

SECT. V

LAW OF NATIONS

WHEN those who know what they mean talk of a State of Nature, they mean neither more or less by it, than the state man is in or supposed to be in before there are such things as Laws. Our Author would fancy for it some other meaning; and goes about to *prove*, that in a state of Nature there are no such things as Laws, his own Laws, the Laws Natural and Divine, always excepted. Tis as if he were to prove that a Triangle is a figure having three Angles.

This done he tells us that Man was formed for Society; which is incontestible, since he is in it; that he is not capable of living alone: as is demonstrated (he says) by the writers on that subject, against the examples (he might have added) of Alexander Selkirk, Peter the Wild Youth of Hanover, Mademoiselle le Blanc of Champagne, and so many others. Not that in all this there is anything to the purpose. | 2

A State of Nature is a state where there are no Laws, where none can possibly exist but the Law of Nature. In this State of Nature it seems we are all equal: which means either that there are none of those which are called natural inequalities amongst us, such as those of health, beauty, dexterity, strength, and stature: or else that there are no civil inequalities: that is, where there are no Laws, there are none of those inequalities that are made by Laws. The former is as true, as the latter is worth telling.

States, there are such things as states in the world: we see it. Nay, says he, but have a little patience and I will prove it to you: ay and commonwealths and nations into the bargain. His argument is that it is *impossible* the world should be all in one state. Improbable enough indeed I should suppose it, but I pretend not to understand like him what is impossible, nor should I much want to know that one thing (if it be so) is impossible, for the sake of knowing that another thing *is*, which I see with my own eyes.

States, or nations, call them which you will, there are: there is a talk of a Law of Nations. Is there | such a thing? If there is 3

V what is it? What does it *consist* of? This is what one would be
Law of Nations glad to know. This is what our Author never thinks to tell us. The 'thus much' which he 'thought necessary to premise concerning'* it (the Law of Nations amongst his other Laws) does not extend so far. He tells us indeed of what it 'depends' on; by which in truth I believe he means, *consists* of. With other men what a thing consists of and what it depends on: the goods for instance and the wharf they stand on, are different, but with him it seems they are the same.

There are two sorts of things then that it consists of, if we may have leave to say so. The one is the rules of our old friend the Natural Law. The other is mutual compacts, treaties, leagues, and agreements (which to judge of them by the manner of his mentioning them are so many different sorts of things, but to judge of them by what other people mean by them, are the same) between these several communities: these states, commonwealths, and nations, which also are the same.

Now it is that light breaks in upon us: Now it is that we may tell boldly what this same Law consists of. It consists in the first place of a piece or of the whole (we are not told precisely how much) of this same Law of Nature from whence it was to be distinguished: in the second and last place of things concerning which he is at no small pains in the next page but one† to shew that they are *not Laws*. This Law therefore consists partly of
4 another Law, and partly of | a thing that isn't Law at all.

Tis but to look back a little and we shall see with what consistency a part of it is said to be made up out of the Law of Nature. The Law of Nature is the Law that men are under when in a state of Nature. The State of Nature is the state men are in when there are no *Municipal* (Laws say I, no municipal ones says our Author). The Law of Nations is the Law that governs the proceedings of Nations towards each other. States are made such by means of the Laws (municipal ones) that are in each. We see now how it can be otherwise than that there should be these two things: and that these two things should be the same.

As to the effect and success it has, I mean of so much as is Law of Nature we need be in no pain about it; as such it must be 'inevitably conformed to': must therefore in consequence have

* I Comm. 44. † I Comm. 45.

been inevitably known, must bid us be happy, and must make us so. As to that part which consists of compacts there is nothing said. However if they want construing, any of them, we are bid go to the Law of Nature, and that will do our business. V *Law of Nations*

From somewhat of all this, but from what in particular is more than I can tell our Author forms two conclusions with which he finishes. One is that as Justinian observes, the Law of Nations is what Natural Reason has established among the Nations: and | the other that this is a very just observation. Tis a rare thing to be a Roman Emperor and to write in Latin: an incontestible title, either of them, to our Author's worship. Very justly observed upon the Law of Nations: and would not be less so upon a Mouse-trap. The Natural Reason of Man in the words of the Roman Lawgiver, the ingenuity of man in the words of our English proverb made one as well as t'other. 5

SECT. VI

MUNICIPAL LAW

WE have had our Author's account of Laws in general: we have seen his account of his three Laws in particular, Law Natural, Law Divine, and Law of Nations: without which there would have been no such thing as knowing what to make of Law Municipal: that is, without one of them which is no Law, there would be no understanding of what it is. We now come to examine with him into the said Law Municipal. A thing that a man has in his hand and which by looking at it one should hope he might learn how to describe. Let him do this well, we will excuse him from describing what exists not to be described.

Of Municipal Law he has given us a formal definition: and of that definition an explanation and in the belly of that explanation a digression 'in which the Nature of Society, and Civil Government'* is made known to us, together with certain other notable matters, as in due time will be made appear. As to his definition, it is this. 'Municipal Law', he says, 'is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.' And this (we have his express word for it) is a 'proper' definition.†

Of this sentence, every member almost that is separably significant has its separate explanation: and in truth it wants it: and that explanation wants another: and if he were to give another that would want a third: and if a third that would want a fourth: and the more explanation he gave it, one might venture to say,
2 the more would still be wanting. | 'First' then says he, 'it is a rule' and this on three accounts: first to distinguish it from a transient 'sudden order from a superior to a particular person'; a thing it never is, for this name belongs to nothing but what is '*permanent*, *uniform*, and *universal*'.‡

Hence we learn three things. *First*, that what *is* a rule for *one* only is *not* a rule: because it is not a rule for *many*. Accordingly he assures us that 'a particular act of the Legislature' (that is, a particular Law) 'to confiscate the goods of Titius or to attaint him of High Treason, does not enter into the idea of a Municipal

* I Comm. 47. † I Comm. 47. ‡ I Comm. 44.

Law'. Into his idea it does not, I suppose, since he says so: and he has a right to put into his idea of it what he pleases: but I fancy it used to enter into other people's ideas, at least before he took a fancy to have it otherwise. Sure I am it still does into mine. From this it seems that upon looking over our Statute book we may learn to make on this score a twofold division of the Laws in it, viz. into Private Laws or Acts which are not Acts: and into Public ones, which are. VI *Municipal Law*

This that he has instanced, we are to observe is rather a Sentence than a Law: by which it appears that he knows as much of the one of these sorts of things as of the other. | Between a Sentence and a Law it were easy enough, tho' it would take up time, to shew the difference: and hereafter it shall be shewn: but this is not our business here. 3

Secondly, we learn that what *is* a rule for a *time* only, is *not* a rule, because it is not a rule *forever*. And hence we have a 2d twofold division of Laws in respect of time: viz. into *Temporary Laws*, which are not Laws: and into *Perpetual* ones which are.

Thirdly we learn, that what *is* a rule in one *place* only is *not* a rule, because it is not a rule *every where*. And hence we obtain a 3d twofold division of Laws: to wit in respect of place, that is to say into Local Laws, which are not Laws, and into *Universal* ones, which are.

One thing may be just mentioned by the bye: that he had no occasion to have said anything about 'a rule': a word that stands in just as much need of explanation as the word *Law* does.

We come now to the second occasion for mentioning Law as being a rule: which second is just as good an one as the first. This is 'to distinguish it from Counsel' otherwise called advice, and on this occasion several pretty antitheses are introduced. | 4 'Counsel' it seems, 'we are *at liberty*' (we have the option) 'to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the Law depends not upon our approbation' (he had better have said *option*) 'but upon the maker's will. Counsel is matter of persuasion; law is matter of injunction: counsel acts upon the willing; Law upon the unwilling also.'

Of all this well-polished confusion the last proposition is that which approaches nearest to being intelligible: and which accordingly appears most plainly to be not true. When a man

contrasts law with counsel spurious

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does what's *commanded* him, he is more willing to do it, I suppose, than to let it alone: else, do it he would *not*, when he does what's *counselled* him, the case, I take it is much the same. A few words more may be pardoned to clear up this confusion. Counsel as well as Law, Law as well as Counsel make men willing to do that which in consequence of such Counsel or such Law is done by them rather than to do otherwise: however reluctant to do it, that is however willing to let it alone were things otherwise than as they are. Both have been determinative of the Will. Counsel by suggesting motives that subsisted already; Law by creating
5 motives that did not subsist before. |

Liberty . . . reasonableness . . . unreasonableness . . . approbation . . . willing . . . unwilling . . . had he settled with himself the meaning of all these words before he had sat down to write the paragraph they stand in, men's ears would have lost some entertainment: but their conceptions would have been spared the vexation of seeking for instruction where no instruction is.

The Law bids me do a thing: this I consider and do it; in doing it I make the Law a rule to act by. I have counsel, or which is the same thing advice given me to do a thing. I consider that advice, and do it, in doing it I make the advice that is given me a *rule* to act by. Why is not this as proper as the other?

There is yet a third purpose for which a Law is called a *rule*: that is to distinguish it from a *Compact* or what is another word for the same thing from an *Agreement*. And this it does about as well as it distinguished it just now from *Counsel*. What follows were it ever so true would be nothing to the purpose. A *Law*, he endeavours to shew, is different from a *Compact*: which certainly is true. But what is it makes them so? The one being a rule, and the other not? By no means. Whether it be to his purpose or no upon that occasion what a compact is, and what is the difference between that and a Law, it is what he would fain have us understand. For this purpose, he tells us that a compact is a promise proceeding from us, Law is a command directed to us, so that the difference between a compact and a Law is the difference between *from* and *to*. This be it ever so true makes not much the
6 wiser. | Not that I am satisfied that it is so. A *compact* I should have taken to be not a single promise given by one person, but a pair of promises reciprocally given to each other by two persons. However if a single compleat the idea of a compact, if

there be one it proceeds *from*, there is another it proceeds *to*: and so it is with Law. Let us try once more. 'It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a Law', that is being interpreted, as it will be by and by, (if of a human law) to none at all; 'but then the obligation is different.' Now alas! we are quite in nubibus chin deep. The old story about conscience and obligations. What he had better | have done is to do as he did once before, and put it 7 into Latin: people would have been the less surprised to find they could make out nothing of the matter. But this is a discovery that few are able to make. The greater part of readers, like our Author, never think of setting about it. Seeing no other words than what they are used to, they take for granted they understand the sense. VI *Municipal Law*

One effort more 'in compacts *we ourselves*' (who are *we*?) 'determine and promise what shall be done, before we are obliged to do it; in Laws *we* are obliged to act, without ourselves determining or promising anything at all.'

This as far as it goes, comes nearest to the purpose of anything we have yet seen: and after a little clarifying may stand thus. What they agree in is this. Both Law and Compact describe an act as an act that *is to be* done. What they differ in is this. A compact is the expression of the will of the person himself who is to do the act in question. A Law is the expression of the will of another person who is not (unless by accident) to *do* the act, but is to create the *motive* to it. Thus much might suffice to shew the complexion of this paragraph, but the reader who sees that all is darkness might not be satisfied without something were done for a little light. A few words shall therefore be employed to shew how the matter stands between a *Law* and *Compact* with respect to *conscience* and *obligation*. For this purpose, however, we must unavoidably enter into some detail. A *Promise*, (the half of a Compact will be enough for us to consider at | a time) 8 a Promise, I say, made by persons living under Laws (Municipal Laws to prevent cavils) is either of a sort that the Laws will enforce and lend their sanction to, or one that they will not. If of the first sort, it carries it is plain an obligation equal in point of conscience to that of a Law: whatever is meant by obligation, and whatever is meant by conscience: because it carries with it that very obligation, whatever it be, that the Law has. For the

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Law adopts that promise as part of itself, and gives it its own sanction. If of the latter sort, whatever other obligation it may carry with it, it has not that of the Law.

Thus much for the affair of obligation: but the '*point of conscience*' remains still unsettled. We have already intimated that people may be deterred from doing an act by three sorts of fears: by the expectation of pain proceeding from three different sources (to speak of those in which intelligent agents are conceived to be concerned) 1 from the displeasure of the deity 2 from the displeasure of man vented upon uncertain occasions, by uncertain persons, and in uncertain quantities, such as it is, and 3dly from the displeasure of man ascertained, announced, and regulated by Laws. Now of these 3 sorts of pains, the first only is that whereof the expectation of which, according to common speech
9 is said to *touch the conscience*: that which is created | by the Laws not touching it at all: and as the obligation this pain creates, our Author, as we shall find by and by, will not allow to carry with it any portion of that which the first mentioned sort of pain creates, the obligation which a compact sanctioned by the Law carries with it, equal as it is to that of the Law is in point of conscience just none at all. And thus much for the present may serve to let in some little light to the signification of the word conscience: that ill-fated word, which scarce ever appears but it brings confusion in train.

The next member of the Definition consists of the words 'civil conduct'—A Municipal Law is a rule of Civil Conduct: which epithet civil sounds very pretty and adds just as much to the sense as comes to nothing. Of civil conduct the meaning (if it must have a meaning) is the conduct of persons living under municipal Laws. Municipal Law therefore we learn from this is a rule of conduct to those to whom it is a rule, and this sublime discovery is revealed to us once more, when we are told that it 'regards' a man 'as' he is 'a citizen'. To make it clearer it is opposed to *moral* conduct which is also a pretty word: as if the conduct which men are made to observe by force of Municipal Laws were not a *moral* conduct: which moral conduct we learn at the same time is the conduct that the Law of Nature and Revelation are the rules of. Which latter too we are told be-
10 sides | being the rule of moral conduct, is also the rule of faith.

The contents of the Scriptures are of two sorts—*expressions of*

will intimating what is or is not to be done under pains therein declared: declarations of matter of fact concerning what exists or has been done, as therein is alleged. The first sort are meant for rules of conduct: '*moral* conduct' if the Author likes it, (tho it has no meaning here) as it is a pretty word. The second sort are meant for rules of faith. In the meantime they are two things that are perfectly distinct: what is one is not the other: so much of them as is *Law* a rule of *conduct*: is not *History* a rule of faith. The old distinction between the *agenda* and the *credenda* one should have thought too well known to have escaped so thoroughbred a theologian as our Author. VI *Municipal Law*

This much we may call the first part of the paragraph: and the second is like unto it. In sound equally agreable: in sense equally instructive. But the particular instruction that is to be gathered from it the reader must pick out as he can. Something to do by way of exercise, must every now and then be left him. For of weighing and explaining every word of those that merit it as much as these, we should never see an end.

The next thing we learn of the Law we are speaking of is that it is a rule *prescribed*. Municipal Law prescribed. What? framed, expressed, and promulgated by authority? what all Municipal Law? every thing that is called by that name? Alas our Author here is tantalizing us—would to God that this were true. I mean concerning every | part of that which is called, and by him 11
amongst the rest, Municipal Law. Common Law, what goes by the name of Common Law is one such part.* As to Common Law, where is it prescribed? How can it be prescribed? What is there in it to prescribe? Who made it? Who expressed it? Of whom is it the Will? Questions all these to which he should have had an answer ready before he spoke of Common Law as real Law, part of the Municipal Law, and of Municipal Law in general, as being a Law prescribed.†

Of the paragraph which follows I need say nothing: it is one of those few of our Author's that may be trusted for expressing its own sense of the matters it touches on, and that a true one.

'A bare resolution, confined in the breast of the Legislator, without manifesting itself by some external sign, can never be properly a Law. It is requisite that this resolution be notified to the people who are to obey it.' Requisite to what? to its being

* I Comm. 63.

† 'Prescribed by the prescriber.'

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a law did he mean, or to its producing the good effects of one? The first of these two propositions however being true, as it certainly is, once more, what sort of a Law, let him say now himself, is the Law of Nature and one half of the Law of Nations?

If by the people he meant *all* the people, every one of those who it is intended should obey it, and it be requisite that it should be notified to every such person, in order to its being a
12 Law, I doubt we might seek long enough for | a Law ere we should find one.

Here our Author has brought a question upon himself which may be rather troublesome. It must be 'manifested' (must a Law) 'by some external sign', it must be 'notified to the people who are to obey it', or else 'tis none. It must be notified to them —why? The answer is plain. A man can not be made to do a thing, unless he first be made to know what that thing is that he is to do. This then is the reason: and if this reason extends to one man it extends to all: it extends to as many men as the Law in question requires the thing in question to be done by. If not, let any one draw the line: let him look over the list of persons who are to do what is commanded by the Law, and say, these it is necessary should know it for them to obey it: these others not. Till such *others* can be found, I suppose it as necessary that one should know it as another. If manifested then (to keep to our Author's words) it must be manifested to somebody: to be a Law it must therefore be manifested to somebody, and for the
13 same reason that to | be a Law it must be manifested to somebody of those it concerns, to be a Law it must be manifested to every one. Manifested it must be, made known, it must be—known it must be. Now then what is that Law which is known to everyone? I doubt we may look a long time ere we find it. I doubt that what we are obliged to him for in this paragraph is the having made out that we have no such thing in the nation as a Law. After his bounty to us in giving us Laws that we have not, he may be the better excused for taking away from us that we have. Tis the misfortune with our Author, in the few instances where he aims at a right mark, to overshoot it. This is what he has done here. Notification of a Law certainly is requisite to something—thus far he is right. But requisite to what? not to its being a Law, but to its producing the good effects of one. The more of those whom it concerns it is made known [to]

the more will it produce of those good effects which the observance of it is calculated to produce. VI *Municipal Law*

Notification then a Law must have: 'but the manner in which this notification is made, is (he says) a matter of very great *indifference*.' In this, it is my ill fortune to be obliged to think differently: to me, I must confess it seems a matter of very *great importance*.

Notification then he is positive it must have: but | to notify to 14
the people a Law, is to tell them of it. Now that it is a matter of great indifference the manner people are told of it is what I should never have imagined. I should imagine the manner how they are told of it should be such a manner as will answer the end of their being told of it, that is, their knowing what it is: else that they might as well not be told of it at all. Indeed there are more passages than this to shew our Author looked upon it as a matter of very great indifference how people are told of it, mentioning as he does such a manner of people's being told of it as nobody could ever come to know it by that lives. The truth of the matter all this while is, it is not their being told of it that is necessary, but your saying they are told of it, when it's no such thing. For it is a right that is claimed by our Author in common with his fellow dealers in fiction, when they speak of the existence of a fact as being necessary to any purpose, (for instance to justify a Law or measure) to suppose it to exist, although it does not, nay even though they own it does not. Tis prudent of them. Tis not less would serve them. For the defenders *à outrance* of the Laws that are (because they are) need not a medium less efficacious than one by which any one thing may be proved right as well as any other.

One may judge else by what he said in p. 185, by the time what he has | said in this, was not improbably forgotten. For 15
sounds, when they have no sense belonging to them, it takes trouble to remember. We are there told that as to 'a Statute or Act' (the name given to a Law here) there needs no formal promulgation to give it the force of a Law, as was necessary he says by the civil Law with regard to the Emperor's edicts. Now if we want his reason for it, it is this—'Every man in England is in the judgment of Law, party to the making of an act of parliament, being present thereat by his representatives'. Every man that is present at the making of a Law has been told of it. Every one of

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these representatives of the people that have a right to a voice in making it was present. Every man who represents five thousand people is those five thousand people whom he represents. These things being premised, one sees how idle it is to require to a Law such a thing as 'final promulgation'. If this be judgment of Law (and not judgment of those who give their dreams for Law) one may say that fire and water are not more at variance than judgment of Law and judgment of Common Sense. The like reasoning seemeth good also to Owen Ruffhead. Tis thus that Law is justified of her Children.

16 | After what we have seen we need not wonder at what follows. 'It may be notified by universal tradition and long practise, which supposes a previous publication, and is the case of the Common Law of England.' This Common Law of England then is 'notified' sufficiently, the 'tradition' of it is as 'universal' as he would wish it. If he means this, one may believe him. In the meantime, who is there that knows it? nobody but a few Lawyers. It is well if *they* do. But whether it is made known in any more effective manner, is to him 'matter of great indifference'. This may be: tho to a Lawyer it is charity to suppose it: but to the people, that it is not better notified is a 'matter of great' and well-merited complaint. 'When a Law is in the usual manner notified or prescribed' (and any manner that is the usual or pretended usual manner will serve him) 'it is then the subject's business to be thoroughly acquainted therewith': I would rather have said, that it is the Legislator's business to do everything that can be done to make him so. Now that might be done which would make him so. But of this hereafter. Meantime ere we make an attempt we may indulge a wish: and would to God the state of things painted by our Author in another place* were
17 as realised as possible, and 'that every man might know | what to look upon as his own. . . .'

An accurate judgment may not be thoroughly satisfied with this picture: but the sense at least is pleased with it, and the heart is warmed.

In the midst of this paragraph on notification comes in an account of that sort of Law which is called an ex-post-facto Law: to what purpose I know not, unless it be to shew with what celerity he can redouble contradiction upon contradiction. This

* I Comm. 53.

sort of Law he mentions as an unreasonable sort of Law on account of its not being notified, forgetting what he was saying in this very paragraph, that what is given for a Law, not notified, is no Law at all. He then gives an instance from Cicero: which instance he had already excluded, as being a Law made against one person and no more. | He tells us of Caligula the Roman 18
Tyrant, who 'hung up' his Laws 'in a small character' (but who *hung them up*—remember this ye Legislators and ye hoarders-up of unpublished judgments—*but he hung them up*) and 'upon high pillars the more effectually to ensnare the people. There is still a more unreasonable method' (continues he) 'than this, when after an action' (indifferent in itself, which if it be, it ought not to be prohibited at all) 'is committed, the Legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action innocent when it was done, should be afterwards converted to guilt by a subsequent Law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All Laws *should* be therefore made to commence in future, and be notified before their commencement: which is implied in the term "prescribed".'

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I have in mind a man should do a thing, I must tell him so; otherwise I had as good have no mind about the matter. He takes this for an instance of a Law not notified: and that is the reason of its appearing here. But in this he is mistaken: the reason for it is notified (that is, there is nothing in the nature of it to hinder it from being notified) to those by whom anything is expected to be done or abstained from in consequence of it: and that's as much as can be said of any other Law. | I know not 19
whether this smooth passage will be thought worth the quantity of words that must be spent upon it to clear up the extreme confusion that involves it: but I must take my chance.

I know not what he means by 'an action' here; whether the species or an individual. I know as little here what he means by ('*indifferent in itself*')* as I did once before. I would suppose he had some meaning in it, dressed as it is in the thoughtful guise

* This remark, 'indifferent in itself', was not in the first edition: it was put in upon second thought in one of the subsequent editions to make things clear.

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of a parenthesis. It cannot mean therefore the same as, *not before prohibited by the Municipal Law*, as far as concerns the Municipal Law, because that is what in other words follows immediately after. Either it means not mischievous, or I know not what he means. But then the Law is *censurable* (*unreasonable* as his word is) on another score, ex-post-facto or not ex-post-facto: and the passage had nothing to do in the description of an ex-post-facto Law as such. The Law is a bad Law as debarring men from pleasure, and thereby producing pain to no purpose. For an action that nobody has a mind to do, nobody prohibits. And to be debarred from what one has a mind to do is a pain. If he means further *believed not to be mischievous by the Legislator*, then is the Law 'unreasonable' on a still further score. The Law is a Law intentionally bad. And this whether an *ex-post-facto* Law or not. So that neither is this any such circumstance as can contribute
20 to render | an ex-post-facto Law, as such, 'unreasonable'.

With respect to the word ('action') the action which 'the legislator then for the first time declares to have been a crime' he may mean an *individual* action and no more: viz. that individual action of that person who is to be punished for it: and this most likely was his meaning: especially as the action declared a crime and punished by the Law cited as an example, or rather punished without more ado (for that was all that was done in it) was an individual action. [Pages 21 and 22 blank.]

23 | We now come to the concluding clause of the definition: commanding what is right, and prohibiting what is wrong. This being the case with a Law, three consequences seem naturally to follow.

1st That what it commands must be a *right* action; what it prohibits a wrong action; else it is no Law. For 'a Municipal Law is a rule . . . commanding what is *right and*' (I should rather have said *or*) 'prohibiting what is *wrong*'.

2dly That the action it commands must be something that *is* right *already*, the action it prohibits something that *is* wrong *already*, that is, before the Law in question goes to work upon it, else on this account it is no Law: for a 'Municipal Law is a rule . . . commanding what *is* right, and prohibiting what *is* wrong'. *Commanding what is to be right*, prohibiting what shall (or is to be) wrong, is what a man would naturally have said that had meant
24 otherwise. |

The two first of these propositions, I shall now consider: what I have to say to the other must be referred to the succeeding section. VI *Municipal Law*

Were I to be asked what it is I mean when I call an action a *right* one, I should answer very readily: neither more nor less than, an action I *approve* of: and so of a wrong action, an action I *disapprove* of. But this is not the case with our Author: his meaning when he uses these words, perhaps at bottom is no other: but this is more than he cares to see. When he is asked about the meaning of these words, he too has his answer ready but in words it is a very different one. *Right* he will tell you (at least on any other occasion which does not shew like the present one the contradictions such language must lead a man into) right, I say, he will tell you is what is commanded by the Law of Nature (or perhaps he thinks of it by that other sort of Law which is sometimes different and sometimes the same with it) the Law of Revelation. *Wrong* what is prohibited by that same or those same Laws. The result is, that tis our old friend the Law of Nature, only in a masquerade, that we are got back again to once more. Municipal Law issues commands and prohibitions: however to be a municipal Law those commands and prohibitions must be such commands and prohibitions as are | 25 already issued by the Law of Nature. The only difference is that when called Municipal Law it takes its instructions from 'the supreme power in the state': Natural Law, from God himself. One may have heard of diversity of operations by the same spirit: here we read of spirits that are diverse, but of operations that are the same.

The bottom of all this is, it is the case with the Author, as it is with me: he does not like bad laws, laws that are wrong, laws in short that he does not like. Thus far we are agreed. But he has gone to work and cleared away these bad laws in a method that I should not have thought of putting in practise. He has turned them into *no* Laws: according to an old established recipe which he learnt of the brethren of the trade, and which he is very choice of. When a Judge meets with a decision pronounced before him, and chooses to decide contrary to it: his way is, not to say it is *bad* Law, that would be wrong: but to say it's no Law: and then all's right.

The obvious effect of the word *right* is to make people suppose

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themselves justified in disobeying or even opposing any Laws they happen not to like: a conduct for which indeed they have still more explicit warrants from several other passages of our Author.

The denying the validity of a Law of which they like not the contents is a common expedient of popular impatience: it is as pernicious and as much to be lamented as it is common: for
26 nothing is more apt to | confound men's understandings and inflame their passions. One could not expect otherwise than to find it countenanced by an Author in whose works every popular and professional prejudice is at home.

To give my own sentiment of the matter. I have my catalogue of Laws, commanding as far as appears to me what is *not* right: and prohibiting what is *not* wrong: very bad laws some; so bad, that it grieves me much to think of them. What follows, in my opinion? that they *are* not Laws? No such thing, but only that they ought not to be. Bad as they are, I find no more difficulty in owning them for Laws than the best I know of. I see much mischief in holding them to be no Laws, for the following are the consequences that may be drawn from it: because if no Laws then is the enforcing them an act of violence without authority: and if an act of violence without authority, then an act which a man is in the right to resist: now to resist, if the enforcing of them be still persisted in, terminates in rebellion. Inferences these which men who use this language are apt secretly to wish to have drawn by others, tho hardly aware of it always themselves, and tho they choose not to own it when aware: but this I think, or none, must be their purpose when they use it.

Now many are the Laws I could conceive, against any of which I should think it right to rebel as soon as I could get enough to join with me to give me a prospect of success: but I know not of any such subsisting at present, taking them singly or even taking them in the whole: much less should I think it right to rebel against every single one of the many which I vehemently disapprove of, because I would rebel, in short, whenever the probable mischiefs of rebellion seemed less to me than the pro-
27 bable mischiefs of submission. |

This is the only rule I can think of for submission and resistance. Does it fail of being explicit? I know of none that's more so. At the worst there is nothing in it to favour the pretensions of

fanaticism either political or religious. It places a question difficult to solve in its natural light of difficulty, without deluding men with a false solution.

I see nothing in the present or any late situation of affairs, or in any future probable one, to warrant resistance: that is, to make it worth men's while. But the notion of a Law's being void by being against the pretended Law of Nature, makes resistance warrantable, nay a point of duty, at any time, or at none.

However this may be, since nothing will serve him but a Law for the measure of right and wrong, the measure of this right which the Law we are speaking of commands and the wrong which it prohibits must either be that Law itself or some other Law: if some other, then what we learn of it by this part of the definition is, that what it does in the way of commanding and prohibiting is just nothing; if that Law itself, then what we are informed of it is that it prohibits what it prohibits and commands what it commands.

Upon the whole what we are taught concerning Municipal LAW (contradictions apart) by this elaborate definition may be summed up as follows: that it is a rule of conduct for those who are to observe it, prescribed by those who prescribe it, commanding what it commands and forbidding what it forbids.

SECT. VII

GOVERNMENT IN GENERAL

THISsh ort inquiry,* short as it is, which might have stood anywhere else as well as where he has put it, I shall pass by for the present: and go on with the definition.

He may say what he pleases about nature and reason, bu to

* [In the following passage, Bentham is referring to Blackstone, I Comm. 52. The idea is developed at length, of course, in the *Fragment on Government*, which was originally meant to stand in this place.]

Supreme Power.

This is as far from being true in fact, as from being of use to explain the nature of the thing defined. Let it be true, and the Irish, the Minorcans, the British-Americans, if British America be among the dependencies of Great Britain, have no such things among them as Laws. The word By-Law had it occurred would have taught him to correct this part of his definition. A By-Law, a Law made by a Corporation in conformity to the Charter which made it such, is, I suppose, a Law to those within the corporation. If not what effect or property of a Law is there that it has not? I should be glad to know some one effect or property of a Law that it has not. But it is not the supreme power in the state that makes a By-Law. It *allows* of it tacitly and passively, but it does not make it. The deliberation, the will, of the supreme Legislative body is not exercised about the matter.

But were the passage true it would be useless. What is the supreme power in a state? The power that is in use to make Laws in any case and over any persons in the state. What is it then that we are the wiser for this passage? what is it that it amounts to? that Law is a rule of civil conduct made by those that are in use to make it: But is not the consideration it will be said an essential one, who it is made by? is it what any one chooses to give for such that is a Law? Most certainly. But the description of the persons to whom it belongs to make a Law, cannot for all that enter into it's definition. It would be too long nor could it be the same for every state. Nor is it so necessary to the definition as might be imagined. We can have a clear idea (and that is the purpose of the definition) of what is a Law when made, taking it for granted that it is made by an authority that is competent, without thinking who it was that made it. We can form a conception of a will expressed without taking into consideration whose Will. We can consider the thing itself without considering from whence it came. Essential as this point for some purposes may be, it is more we see than can be settled within the ordinary compass of a definition. A definition, if of a reasonable length, must in this point be defective. The defect, which then avowed neither misleads the reader, nor is chargeable upon the writer, is not palliated, by an expression which pretends to remove

understand or imply a thing as existing, which according to his own account never did, is what on his own account he shall never have my leave for. If he has a license to take what suits him for true, at the same time that he says it's not, he has no use for such a contract, as well understand and imply whatever it is he wants to make out by the help of it. But it is the way with Lawyers, and above all with this Lawyer: they can no more speak at their ease without a fiction in their mouths, than Demosthenes without his pebbles. Such is the power of professional prejudices to deprive the understanding. They feed upon untruth, as the Turks do upon opium, at first from choice and with their eyes open, afterwards by habit, till at length they lose all shame, avow it for what it is, and swallow it with greediness, not bearing to be without it.

it, and does no such thing. The passage, insignificant as it is in one sense, is not innocent. For that is not innocent, the tendency of which is to betray men into a notion that something is said when it is just as much as comes to nothing: to habituate them to pay themselves with sound instead of sense.

By this time we may know what to think of the 'natural inherent right that' we are told, 'belongs to the sovereignty of a state wherever that sovereignty be lodged, of making and enforcing Laws'. That the said right belongs to the said sovereignty, is a proposition well suited to our Author's logic.

Sovereignty and Legislature.

Had he had any ideas in his mind before he could have thought of making a question of it: this is what he must have done. In the first place he must have formed to himself a notion of sovereignty, a sovereign body in a state, without any notion of the power of making Laws, which I should suppose to be no easy matter. This however he must have begun with: in order to have a notion of the subject to which the attribute in question might or might not be conceived to belong: and then and not till then would he have set about enquiring whether the attribute did in fact belong to it.

The pleasant part of the story is, that the sentence had at that time hardly passed his pen, in which he had roundly pronounced, that 'Sovereignty and Legislature are convertible terms'. Tis just as if a man were to observe a stick and a staff are convertible terms; and then proceed to enquire [if] what is said of the first could be said of the second.

SECTION VIII

PARTS OF A LAW

A LAW is either a proposition or an assemblage of propositions. If it be a command, it is a proposition, one or more—If it be a prohibition, it is still a proposition, one or more. This is no more than what is true of every discourse. And Law is a species of discourse. A proposition (I use the word in the sense Logicians use it) consists of 3 things: The two terms, *subject* and *predicate*: and the *copula* that connects them.

What then can be the parts of a Law? either entire propositions or the parts of a proposition. Our Author had studied Logic: here was the occasion if ever to make a use of it. But Logic as studied in the Universities, is an instrument which they pretend to teach how to correct, but never think to teach how to use. It is not the art of gaining instruction or of communicating it: it is the art of disputing as nobody ever disputes.

In the above way a man might have proceeded in dividing a Law into its parts: the following is the way our Author has proceeded. The parts he tells us that are in a Law are four: the
2 declaratory, the Directory, the Remedial, | and the Sanctional, otherwise called the vindicatory: and in '*every Law*' these parts are to be met with. Let us consider what he says of each.

The declaratory part, is that 'whereby the rights to be observed, and the wrongs to be eschewed are clearly defined and laid down': Here instead of being told of actions that are to be done or to be abstained from—language that every man understands, we are thrown back again and told once more of rights and wrongs: words which themselves stand much more in need of explanation than the word Law which they are brought in to explain.

For what purpose the word 'clearly' was brought in is more than I can conjecture: That the rights to be observed, and the wrongs to be eschewed (whatever rights and wrongs mean) *ought* to be 'clearly defined and laid down' is what any one would join with him in thinking: but that they actually are in every Law that is is much better news than one could have imagined to be true. Devoted adorer as our Author is of the works of the powers that

be, and still more of those that have been, the proposition is too extravagant to be imputed even to him: or we might suppose that as it is with ecclesiastical laws in every respect, so it is with all laws in this respect, everything is as it should be. | Of this definition it is sufficient to observe at present, that having the same terms in it (rights and wrongs) as that just noticed, it has the same degree of perspicuity. VIII *Parts of a Law* 3

The remedial is that 'whereby [a method is pointed out to recover a man's private rights, or redress his private wrongs'.]

To understand this fully it is necessary to anticipate a little of our Author's plan and to direct the reader's attention to the grand division of the book. This is taken from what he says are the objects of Laws: of which there are 4 sorts. 1st Rights of persons: rights of [things]: Private wrongs and Public wrongs. For each of these sorts of objects there is a set of Laws: the Laws relative to each object he treats of separately under the head of each. Now then, of the Laws that concern Public wrongs and nothing but Public wrongs, where is that part that 'points out the method to redress private ones?' Of a law for example against exporting Wool (let him take any other that exists or that he can imagine) what is that part that redressed private wrongs: | and what are the private wrongs for it to redress? and how does it redress them? Yet 'every Law may be said to consist of' this 'part' as well as of the other three. 4

The Sanctional or vindicatory branch (for now for ornament's sake the word *part* is changed into *branch* agreably to a practise constantly observed by our Author in this philosophical Introduction) the Sanctional or vindicatory branch is that 'whereby it is signified what evil or penalty shall be incurred by such as committ any public wrongs, and transgress or neglect their duty'.

Thus in the first place Laws that concern *private* wrongs merely, have no such thing belonging to them as a Sanction: at the same time that 'every Law may be said to consist of' this part as well as of the other three.

In the next place this Sanctional part, turns out a little further on to be* of two sorts: sometimes vindicatory, sometimes remuneratory: the vindicatory consisting in punishments (for he would scorn to mention 'evil' or 'penalty' twice over): the remuneratory in 'actual particular | rewards': for Laws there are 5

* I Comm. 56.

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that have rewards for their sanction, tho 'the most part' (so 'Legislators have chosen' to make it) have the other sort of sanction that 'consists in punishments'. And yet there is no Law but 'may be said to consist of' this '*sanctional* or vindicatory' part 'whereby is signified what evil or penalty shall be incurred,' as well as of the other three parts. But more of this presently. Under the head of each of these parts, observations are subjoined, and 1st concerning the Declaratory part.

'This', we are told in the first place, 'depends not so much upon the Law of Revelation or of Nature, as upon the wisdom and will of the Legislature'. The purport of this smooth distinction I must profess myself unable to comprehend. Of the Law of Revelation I know not what part he would have the municipal Law to depend on, nor in what sense he would have that part, whatever it is, depended on. Of the Law of Nature, as I have often said, I know nothing, since it is a non-entity. But be the first what it will, and the second something and that something what it will, and let the declaratory part (if there is such a thing)
6 of the | Municipal Law depend upon them, I see not why the wisdom and will of the Legislator should be less concerned than were it otherwise. At any rate I suppose there must be a will of the Legislator exerted: else I don't know what's to become of the Law. And if the municipal Law must at all events, come what will of it, depend (not that I understand perfectly the meaning of depending) upon these two Laws, it must require no small share of wisdom, I should conceive, to find out what they have to do in the affair. His wisest way I should conceive would be to do what is generally done, never to trouble himself about them; neither in part directory, declaratory, remedial, nor sanctional: Supposing his Law has in it those parts: but to provide according to the best of his judgment for the happiness of the Society on that behalf: which is a course however that will cost him infinitely less painstaking and deliberation (if *that* is meant by 'wisdom') than the other.

This doctrine we are next told 'deserves a more particular explication': hardly I should think as to *deserving*: tho as to
7 *requiring*, if he had said that, it requires to make it | intelligible, more than all that both of us shall have said together.

Those rights then which *God and Nature* have established, and are therefore called Natural rights, such as life and liberty, need not

the aids of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal Laws to be inviolable. What our Commentator means by 'more effectual investment' on this occasion, or by 'additional strength', I must profess myself utterly unable to comprehend: but this I know that I am heartily glad of the aid of the human Laws to invest in me my life and liberty, needless as he may think it: that I do conceive my right to them at least very much strengthened by these same human Laws: and that were it not for the said Laws, I should be much puzzled to say what right I had to them at all. In the contrary, continues he, 'no human Legislator has power to abridge or destroy them, unless the owner shall himself committ some act that amounts to a forfeiture'. Here I am again gravelled, not being able to understand how it is that a Legislator should not have powers, perhaps the | power (I mean legal power) that the 8
Legislator has to do everything he has physical power to do, or else he would not be one (that 'omnipotence' as our Commentator calls it when he is in a rhetorical mood) our old friend the Law of Nature is to be understood in this case to come and take it away. But letting that pass, and letting him give the Legislator as much or as little power as he pleases, one question I find myself obliged to put to him that may be a little troublesome. Has the legislator or has he not *power* to declare what act *shall* amount to a forfeiture? If he has, what is the subject the better for this want of power in the legislator that so much stress is laid on? If not, what is to become of those laws that inflict loss of life or liberty for their sanction? that is what is to become of the greatest part of all our Laws?

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'Neither do divine or natural duties (such as, for instance, the worship of God, the maintenance of children, and the like) (what are the like?) receive any stronger *sanction* from being also declared to be duties by the Law of the land.' I am now quite gravelled. Either he means by this that the part he calls the | 9
sanction is not the same thing with the part he calls the declaratory, or he is talking of the sanctional when he means the declaratory, or his ideas are so effectually confounded by his own 'explication' of them that he knows not one from t'other.

'*The case is the same* as to crimes and misdemeanours that are forbidden by the superior laws' (he means I suppose the Laws of

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Nature and Revelation tho he would not say so for the world) 'and therefore stiled *mala in se*, such as Murder, Theft and Perjury, which contract no additional turpitude from being declared unlawful by the inferior (I suppose) the human legislature'. *The case is the same*, he tells us, with these crimes as with these duties: whence we learn that there is a certain 'sameness' between 'crime' and 'duties', and between the 'not receiving any stronger sanction' and the 'contracting additional turpitude'. If turpitude means 'mischievousness' who could ever have supposed that any crime could contract additional mischievousness by being punished, much less by being declared unlawful: that is, by being called a crime: if not mischievousness what else?

10 | This is the first occasion of our hearing of the acute distinction between *mala in se*, and *mala prohibita*; which being so shrewd and sounding so pretty, and being in Latin, has no sort of an occasion to have any meaning to it: accordingly it has none. 'Theft' is here a malum in se in this page as luck will have it. In the fourth Volume and in the eight-and-twentieth and nine-and-twentieth pages of it, it is a *malum prohibitum* merely, being there put in point-blank opposition to murder, with which it is here in company.*

11 | What sort of a thing he would make of Murder, Human Laws which constitute the essence of it being out of the question, is a demand I have made on a former occasion. I might make the same of Perjury.

'For that' (the human) 'Legislature in all cases acts only as was before observed, in *subordination* to the great lawgiver' (in other case how does it act? as his co-ordinate or superior?) 'transcribing and publishing *his precepts*'—these precepts which during all the time from the beginning of things were presented and dictated by God himself, insomuch as to be inevitably conformed to: that legislature of whose precepts the one half is not

* Vol. IV, p. 28.

'If a woman committ theft, burglary, or other *civil offences* against the *Laws of society*, by the coercion of the husband; or & . . . she is not guilty of any *crime*. . . . But p. 29 even with regard to wives, this rule admitts of an exception in crimes that are *mala in se* and prohibited by the Law of Nature, as Murder and the like: not only because they are of a deeper dye: but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to *natural crimes*, by the refinements and subordinations of civil Society.'

so much as written, and of the half that is, a great part not made known, if that be meant by published, to the tenth part of those that are to obey them. VIII *Parts of a Law*

So that upon the whole (concludes the paragraph) the declaratory part of the Municipal Law has no *force* or *operation at all* with regard to actions that are naturally and intrinsically wrong. If this be the case, what's the use of it? and why is it a part in 'every'* | Law? 12

Thus much for crimes that are *mala in se* : we now come to 'things' (he would not say 'actions') 'in themselves indifferent' elsewhere called *mala prohibita*. We shall see what the declaratory part of a Law does with them.

With them we flounder on, still tossed in the same whirlpool of undefined and fluctuating words, amidst which starts up now and then something of a notion that is evidently false. With them 'the case' it seems 'is entirely altered. These become right or wrong, just or unjust, duties or misdemeanours, according as the municipal Legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life.'

As to right and wrong, just and unjust, I wash my hands of them. All I had to say of them I have said already: it's in vain to hunt after the meaning of them any more. One thing may be true of them as well as another, for any thing I can have to say against it. But when we come to duties and misdemeanours, we are got for once within our knowledge. A duty is an act commanded. A misdemeanour is an act forbidden. What then are we to understand of commanded and forbidden acts? Are we to understand once more that they are commanded by the Legislator when he commands them, and forbidden when he forbids them? Or that | by his commanding they become commanded, 13 and by his forbidding forbidden by the pretended law of Nature? and so that in making Laws that command or forbid them, he makes Laws of Nature?

But he comes to examples—Thus our own common Law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband: (he might as well have added 'unless it is agreed otherwise') and our Statute Law has declared all monopolies a public offence: yet that right, and

* I Comm. 53.

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this offence, have no foundation in nature; but are merely created by the Law, for the purposes of civil Society. 'That the goods of the wife do instantly upon marriage (unless as above excepted) become the property and right of the husband' I understand: because I know that the Law will punish any body else that takes them: that our Statute Law had done as much as 'declare all monopolies'* a public offence I also know: for it has
14 declared how it will punish those | that exercise them: but whether that right or this offence have any foundation in nature, is what I can say nothing to: not knowing what he means by '*foundation*' in this case, nor what he means by '*nature*'. Indeed what stands opposed to it, 'that they' (that right and this offence) 'are merely created by the Law, for the purposes of civil society', I have some notion of: and I have precisely the same notion of every other right, and every other offence: more especially of those that by the supposition are made such by the Law, being those of which he is speaking.

'And sometimes' he goes on, 'where the thing *itself* has its rise from the Law of nature, the particular *circumstance* and *mode of doing it* become right and wrong, as the laws of the land shall direct'. This I shall be able to speak to, as soon as I know wherein the difference lies between 'the thing itself' and what stands opposed to it, 'the particular circumstances and mode of doing
15 it', which is what I do not at | present, nor even after the following example.

Thus for instance in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who these superiors shall be, and in what circumstances, or to what degrees they shall be obeyed is the province of human Laws to determine.

Here I suppose 'obedience to superiors' is to represent 'the thing itself': that is, the act of paying obedience to superiors, or the Law commanding men to do the act of paying obedience to superiors, I can't tell which. And 'who those superiors shall be,

* Viz. when at the time these Commentaries were first published for since then, viz: by G.3.c. the Laws against exercising monopolies have been repealed. I say against exercising. For the Statute against procuring authority from the King to exercise them remains: tho there is no use in it: for nobody will be at the pains of procuring, were it to be procured which it is not, an authority which everybody knows to be waste paper.

and in what circumstances or to what degrees they shall be obeyed' is to represent 'the particular circumstances and mode of doing it'. As to this matter what I conceive is this (for of what our Author conceives I know nothing) that as to a Law commanding men to do the act of paying obedience to superiors, unless it declares who those superiors are, it is a Law that | says 16 just as much as comes to nothing: and that as to the *act of paying obedience* to superiors but not in any particular circumstances, not to any particular superiors, there is no such thing. I also conceive that when a Law says to a man do such an act: he either *does it* and then he *obeys*; or he *does it not* and then he does *not* '*obey*': but what sort of things *degrees* of obedience are, is what I do not conceive: perhaps our Commentator meant instances. VIII *Parts of a Law*

'And so', concludes the paragraph, 'as to injuries or crimes, it must be left to our own (not to anybody else's) legislature to decide, in what cases the seizing another's cattle shall amount to the crime of Robbery; and where it shall be a justifiable action, as when a Landlord takes them by way of distress for rent': Undisputably, and with equal propriety he might have brought in all the injuries or crimes that are noticed by any or all the Laws we have; and with equal truth he might have said the same of them he has done of these. 'As to *these* it must be left to the *legislature* to decide' . . . and as to what others must it not? and when not to the legislature to whom else? The very | things 17 these which the purpose of the example required him to tell us, and the very things which assuredly he will never tell us.

If for a moment, instead of the unintelligible words, unintelligible as he uses them, right and wrong, just and unjust, he could prevail upon himself to put the words beneficial and mischievous which are intelligible, and bear a meaning nearest to what the first mentioned set of words appear to point to, what he says of them would presently appear to be false.

Suppose this done. Then what we learn from him is, that things (i.e. actions) in themselves indifferent become mischievous or beneficial according as the municipal legislator sees proper. If this be the case with any sort of actions, he is a sad wretch, this same municipal legislator if he does not make all of them beneficial, if he leaves any one of them mischievous.

By a beneficial and by a mischievous sort of an action, I know

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perfectly well what I mean: and I am inclined to think that others do so too. By a beneficial sort of an action I mean a sort of action that is more apt to produce pleasure than it is pain: by
18 a mischievous, more apt to produce pain than it is pleasure. | By things that are indifferent, I suppose he means actions that are indifferent to happiness: if not, I have no more to say to him, he may mean anything for aught I know. As to the '*in themselves*' that any body may make of what they can. Actions that are indifferent to happiness are actions that are indifferent to pains and pleasures, actions that are indifferent to pains and pleasures, are actions that produce neither pain or pleasure; Now these, if any such there be, are a sort of actions men, I conceive, are not very apt to do: for my notion of man is, that, successfully or unsuccessfully, he aims at happiness, and so will continue to aim as long as he continues to be man, in every thing he does. But if men were ever so apt to do them, it is more than I can conceive, what business or what inducement any Legislature can have to meddle with them.

Perhaps our Author may be disposed to say, or somebody to say for him, that by actions indifferent he means acts indifferent to the pains and pleasures of persons other than the agent himself: that is, he whose acts they are. In this case I am still as much
19 at a loss as ever to | comprehend what business or what inducement the Legislature can have to meddle with them, as thus interpreted: because certainly in general a man knows better what pleases him, than another man who never saw or heard of him. Still less can I comprehend how sorts of actions that produce neither pain nor pleasure, can be made to produce either, just as the municipal Legislator thinks proper. I could instance indeed many sorts of actions that by the contrivance of the Legislator may be made and are made to produce an effect in point of pain or pleasure different from what they would without his meddling, but how he should be able to make them do this just as he sees proper and that with respect to all actions and those only that of themselves are apt to produce pain or pleasure in the agent and on none but him, is what exceeds my capacity to conceive.

'Thus much', continues he, 'for the *declaratory* part of the Municipal Law: and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration

being usually collected from the direction. The law | [20] that says, VIII
"Thou shalt not steal", implies a declaration that stealing is a *Parts of a Law*
crime. And we have seen (seen no such thing) that in things naturally indifferent, the very essence of right and wrong depends (upon what? would one think?) upon the direction of the Laws to do or to omitt it.'

What we have seen is what he has been telling us, as at least he said then, of the *declaratory* part, and of a something I don't know what that depended upon it: how he says that this something depends upon the directory; and that it is *that*, that we have seen. The truth seems to be, that not knowing the difference between a part that he has heard of under the name of declaratory, and a part that he has heard of under the name of directory, and not having perfectly settled with himself the meaning of '*depending*', he can not tell whether it is upon the *declaratory* that the aforesaid something depends, or upon the *directory* or upon both.

| We now come to the Remedial part: 'and this' we are in the 21
first place told, is so necessary a consequence of the other two, that Laws must be very vague and imperfect without it. '*Vague*' —agreed—but would they or would they not be laws?—Imperfect—that is a little more precise, from thence I conclude that if an instrument or discourse have not this part, according to our Author it is not a law. 'For in vain', continues he, 'would right be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights (method prescribed by the Law I suppose he means) when wrongfully withheld or invaded'. True—Laws may be vain; but yet they may be Laws. He owes us a definition; he pays us with declamation. Not that all Laws are necessarily vain, neither, that are improvided with this method. For there are cases where 'shame' (as an elegant writer phrases it) 'where shame' I say 'follows the finger of the Law'. Now this '*shame*' which is the ill-will of those a man has to deal with, or else the apprehension of that ill-will or of disesteem which produces ill-will, is what may | be termed 22
the vindicatory *moral* sanction: as esteem, followed by good-will may, the *remuneratory*: and the first of these is executed upon transgressors by 'a method' which is not the less sure for issuing from the Law: and this may have and has the effect of asserting many of those rights when invaded; for as to '*recovering*' and

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'*withholding*' rights I know not what it means, without making the signification of the word rights different in the two cases.*

I am obliged here to introduce the sanctional part into consideration, since it is what runs in his head all the while, as will appear plainer presently, and which could not but run in the head of a man who was talking of the remedial, and meant anything by it, since it is what stands before the remedial in order of contemplation: being that, which it is the business of the remedial to prescribe the method of applying.

23 | 'This' (the remedial) (continues our Author) 'is what we mean properly, when we speak of the protection of the Law'. I should have thought it was the *whole* Law that we meant: for we must have the whole Law to protect us (or at least the directory part of a municipal Law with the moral or religious sanction to it) or else we have nothing.

But he now treats us with 'an instance', and that instance betrays the nothingness of his notions concerning this remedial part. We must attend to this instance: because it may serve to lead us to true instruction, tho his is false.

'When the declaratory part of the Law has said that the field or inheritance, which belonged to Titius's father, is vested, by his death, in Titius; and the directory part has forbidden any one to enter on another's property without the leave of the owner; if Gaius after this will *presume* (naughty presumptuous Gaius!) 'to take possession of the land, the remedial part of the Law will make Gaius restore the possession to Titius, and also pay him damages for the invasion.'

24 | One thing in our Author's method of proceeding is worth remarking. Every Law he tells us has these 4 parts to it. He takes an imagined Law against stealing: upon this he exemplifies the first of these parts. Thus far on his way, how proceeds he next? He stops short all on a sudden, drops this example, and betakes himself to another. What it was that stopped him is plain enough to see. He had been told by some oracle of his of a remedial part as belonging to a Law: and so he was resolved to have one. But looking for it in the Law he had begun, he could

* Making it in the case of recovering and withholding mean the *physical thing* or *substance*: in the case of asserting, the *moral relation*: and then at best the expression asserting rights, for a didactic treatise, is a very vague expression.

not find any such thing. Nothing could he find in that example VIII
that would suit with even his loose and confused idea of a remedial *Parts of*
part. This obliged him to look out for another. It's plain from *a Law*
this he found himself bewildered: and yet so indifferent is he to truth, that he is content to bewilder others, rather than be at a little more trouble to find it out. Here was a great breach, a great solution of continuity in his doctrine: but an old specific of his he had found to succeed so well with him, that he was not afraid to trust to it: a little smooth language to skim over the flaw. He has now therefore another example to look out.

| In the common language of the bar, *damages* is often spoken 25
of as *a remedy*. And the restoring a man a thing he has a *right* to, comes within of a remedy (in part at least) to the *wrong* done him, by taking it away from him. Out of these two ideas he has patched up in the manner we have seen, that of the remedial part that is to be found, he told us, in *every* Law.

Question upon question will here occur to those who see how far this account is from containing anything that is intelligible. Is it to appoint these damages that is the 'office' of the remedial part, or only to appoint the course to be taken for recovering them, or both? If the former only, then how differs this part from the Sanctional? If the latter only, then how comes it to appear before the sanctional which it speaks of? If both, then how came these two parts so different to be reckoned but as one? How is it that this part of the Law more than any other part makes Gaius restore the possession, and pay the damages: and what is it that it does to make him? Is it that this part and not the rest is the cause that he restores and pays? No, for that is an effect that | belongs to the whole of the Law together. Is it that 26
it says that he shall restore and pay? No, for that belongs to the sanctional part, if this sort of Law is understood to have a sanction belonging to it, and that sanction any meaning. Or, to come at last to the truth of things, and to give this *remedial* part something of a sense (tho very inappositely indicated by the term). Is it not the case thus after all, that it bids a somebody else and not Gaius to take the field from Gaius and give it back again to Titius, and also to take money's worth from the same Gaius and give it to the same Titius, under the name of damages (that is, reparation of damages) sustained by him from being so long out of it? Whatever the Law does, whatever it 'makes' a

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man do, it does, it makes him do by speaking. It has a mouth. It has no hands. In the directory part it bids, in the sanctional part it prophecies. In the remedial part (of that complex apparatus I mean which our Author treats as if it were *one* Law) in the remedial part it bids other men than him whom it bad and prophecied before to fulfill such prophecy (I speak here of a Law with a penal sanction) upon the first man in case of his disobedience.

27 | A thing the Author sees not all this while, but what it may be proper should be known, is that what he has here given as a part of *one* Law, is in truth that vast assemblage of Laws that concur in establishing (so far as it is adapted to the *principal* Law in question I mean that made up of a directory part and sanctional) in establishing I say the *apparatus* of *procedure*. That he and his followers may understand me, I will refer him to his own Analysis. By apparatus of Procedure I mean that assemblage of Laws whereof he gives the account that is comprehended under the third table of his Synopsis and the third division of it entitled 'Of the redress' given 'by . . . Suit in Courts'.

Thus much may serve for a hint of what might have been said of these supposed parts of a Law, or rather of the division that might have been made of an assemblage of connected Laws into the constituent parts of it. Let us now follow our Author to his account of the fourth and last of his parts of a Law, which ought to have stood third, the Sanctional.

28 | We have already taken occasion to mention how consistent his division of the sanctional part is with his other name for it: let us now consider the reasons he gives why it is more common to see it of the '*vindicatory*' sort than of the '*remuneratory*' : in other words why it is more common to see it in the shape of punishment than of reward: of pain for disobedience than of pleasure for obedience. These two heads comprehend all he says of it.

The reasons he gives are three. The first is that 'the quiet enjoyment of all our civil rights and liberties which are the sure and general consequence of obedience to the municipal are in themselves the best and most valuable of all rewards'.

The second is—that 'were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty'.

The third is—that the dread of evil is a much 'more forcible

principle of human actions than the prospect of good'. And for this last Locke's Essay is referred to. VIII *Parts of a Law*

Of these reasons it may be remarked, that the first is not true in the sense in which it must be true to be a reason. It is either false, or nothing to the purpose. The *second* has truth at bottom, but is so uncouthly turned through affectation of ornament, as scarce to express its meaning. The *third* is | so generally and so 29
loosely worded, that as a matter of fact one scarce knows whether to assent to or deny it. And these, were they all true, are not all that might be given. As to the first—it is not true that 'the quiet enjoyment and protection of all our civil rights and liberties, are the sure and general consequence of our obedience', in the sense in which it must be true of benefits for them to operate as rewards. The use of punishment is to cause men to observe a sort of conduct, by being annexed as a consequence to the non-observance of it. The use of reward is to cause men to observe a sort of conduct by being annexed as a consequence to the observance of it. What is capable of being made a punishment of, in that manner, *is pain.* What is capable of being made a reward of, is *pleasure.* Pain, in order to cause men to observe a sort of conduct, must be so annexed to that conduct, as to become an inducement to it. It is the same with *pleasure.* Pain to serve as a motive to a sort of conduct must be so connected with it, as that if the conduct be *not* observed, the pain will be suffered, at least appear likely to be suffered, otherwise not. Pleasure in like manner to serve as a motive to a sort of conduct, must be so connected with it, as that if the conduct be observed the pleasure will be reaped, | at least appear likely to be reaped, otherwise 30
not. Hence it appears, that the 'quiet enjoyment and protection of all our civil rights and liberties' (to use our Author's perturbate phraseology) cannot serve as a motive to any sort of conduct, nor therefore answer the end of a reward. For whether the sort of conduct in question be observed or no, those rights and liberties of his will be protected all the same. If I take a fancy to steal a horse of my neighbour's, it is probable I shall be hanged for it and the consciousness of that danger is a motive with me to let the horse alone: but the like protection granted me against other men for my horses is no motive with me for not meddling with that man's horse, because whether I steal it or no, another man will be hanged all the same for stealing mine.

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And this is a case of forbearance, or inactive observance. In a case of action, of active observance, it is the same. For example that of taking on me the office of a Judge, or discovering the Longitude. And here we may see the difference between real rewards that stand opposed to punishments, and these pretended ones. The yearly salary annexed to the office of Judge is a reward and operates on a man as a motive to wish to take upon him that office. Let our Author answer else. The gross sum
31 promised to the man who shall discover the longitude is a | reward, and has operated as a motive on persons who have thought themselves qualified for endeavouring at the discovery.

In the foregoing instances there could be no room for hesitation between reward and punishment: because it is not every man that would do for a Judge, or for a discoverer of the longitude: and because with respect of the few that might be, to fit a man for either of these employments requires acumen that nothing but alacrity can inspire; because nothing but hope of pleasure can inspire alacrity: and a whipping-post or a gaol would be but awkward instruments to whet their wits on.

With respect to others, the office of Constable for one, it is otherwise: because any man almost may do for a Constable: therefore the Law has its option about making men constables, whether it shall be by dint of reward or punishment. Reward it might choose. Punishment it has chosen. Now suppose it thought proper to alter its plan in this instance, and go to work by reward instead of punishment. How would it proceed? talk to men of the 'quiet enjoyment and protection they have for their civil rights and liberties'? It might talk thus for everlasting, ere a man would stir. Offer a competent stipend to the man that will take upon him the office? it would soon get constables in abundance.

32 | The question we see is, why in order to get particular points of conduct observed, the Law goes to work by *particular* allottments of punishment, and not by *particular* allottments of reward. Our Author's reason is, that it has in its service a certain *general* allottment of reward, which answers the purpose: whether it does or not, does not, the reader I suppose by this time sees.

As to his *second* reason—We are told indeed that the giving rewards in all cases is a thing impossible: than which reason being so true as it is, there certainly can not be a better. Indeed

it is so good an one that it might spare the trouble of searching for more. But he has almost spoilt it in the telling. We are told, I say, that it is impossible: but the reason of that is, we are not rich enough. A little more money to dispose of, the national debt paid off perhaps, and the business might be done. This is the aspect he has given his *second* reason. VIII *Parts of a Law*

As to the *third*, true as the notion may be in the main, it appears doubtful at least in the loose manner he has expressed it. Love is generally acknowledged to be the most powerful stimulative of any, even to actions which the fear of evil and the prospect of good are both capable of serving as motives to. But Love is the 'prospect of good'. And there are exertions with respect to which, as we have already hinted, the latter sort of motive has not only the *most* 'force' of the two, but is in a manner the only one of them that has *any*.

All this reasoning may go near to sum a mere matter of supererogation. For the use of reasons for a method of proceeding is to satisfy those who without them might | be dissatisfied. Now 33
that any one having observed thus much, that more use is made of punishments than of rewards should be apt ever to take up a dissatisfaction, is what I hardly should conceive.

However, since the question is started, we may as well follow it to an answer. To express the above reasons so far as they have any truth in them, together with another or two that may be added, to do this I say, without parade, and with something like precision, I would say thus.

In the first place, the receivers would be the same persons as the payers. There are many points of conduct that are *expected* to be observed by all men; and that actually *are* observed by all men—with so few exceptions as not to deserve notice, all men therefore having obeyed, all would be to receive the reward for it. This would apply against rewards were the sum necessary to be given ever so little, and the occasions of giving it ever so few. It depends not, as one would imagine from our Author, upon the quantity of the stock. Were rewards to be given, right hand must pay left: and a man must just take his money out of his pocket, to put it in again.

In the second place, the occasions of paying would be infinite. Of the points of conduct which the Law requires of a man, much the larger share consists in acts, if they may be so denominated,

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of forbearance. Now acts of forbearance are infinite. If a man die without having | 34 committed murder, it is as true of any one imaginable part of his life that he observed the law against murder as of another. And the imaginable parts in a man's life are infinite. The occasions of giving reward to any one man for any one crime would therefore be infinite.

A third reason is, that the Law can at the same cost produce more pain in a man by the method it has of producing pain, than pleasure, by the method it has of producing pleasure. The only way it has of producing pleasure is by furnishing men with the instruments of it. This it does by furnishing them with money, by which the greatest part of those instruments may be purchased. But settle the par between pain and pleasure any how, let any degree of pain be supposed equivalent to any degree of pleasure, a 'bare bodkin' can produce more pain, than mountains of gold can produce pleasure.

A fourth, and the last reason I shall give, is, that it can be surer of producing pain by the methods it has of producing pain; than pleasure, by the methods it has of producing pleasure. All 35 it can do, as has been observed already, | towards producing pleasure, is to furnish the instrument of it. But, for pleasure to be produced, the instrument must meet with the desire. Tho the Law should furnish the instrument, it cannot the desire. It may give a man money: but it had as good do nothing, if his desire to do the thing it wants to keep him from, or to let alone the thing it wants to have him do, is stronger, as it may easily be, than the money it can have to give him.

But to return to our Author. His account of the parts of a Law now comes to a conclusion. And the conclusion is not ill-fitted to the work. These parts, thus clearly explained, must now be drawn into competition: and he undertakes now to tell us, which of them is the most effectual. This, at first sight, is as if he were to tell us, which of the letters of the word Law was most significant.

'Of all the parts of a Law', says he* 'the most effectual is the *vindicatory*. For it is but lost labour to say "do this, or avoid that" unless we also declare "this shall be the consequence of your non-compliance". We must therefore observe that the main strength and force of a Law consists in the penalty annexed to it. Herein is to be found the principal obligation of human Laws.'

* I Comm. 57.

Our Author is more and more unfortunate. The very part that he instances as having no force of itself is the only one of them all that has any. VIII *Parts of a Law*

| Of the distinguishable parts in a Law there is one as it happens, that may tho not absolutely of itself, yet without the other parts possess a certain degree of efficacy. But this part is not that he mentions. It is the Directory: it is not the Sanctional. The Directory part, it is true, in most cases would be not at all, or but weakly effectual: but in some, as we have already intimated, it may be and is very tolerably efficacious. At any rate it is intelligible: it is something. 'Steal not' is something: is intelligible: it is a *will expressed.* It may or may not be observed; it may or may not be effectual. But this is a directory part without a sanctional. But 'You shall be hanged if.' . . . This has no meaning: it is nothing: it is no will expressed: there is nothing to observe. And this is a sanctional part without a directory. 36

In like manner the remedial part of the Law as he perhaps would call it: (the cluster of subservient or Adjective Laws tacked on to this in common with many other single Laws of the kind that I would call Radical or Substantive) of itself is nothing: tho the directory part of the Substantive Law, much more that Substantive Law entire is something. 'Let the | Constable apprehend' . . . 'Let the Judge condemn' . . . 'Let the Sheriff execute' . . . all this is nothing until you have subjoined 'him who is to be hanged'. And if any one is to be hanged, it is because the Substantive Law has said in the Directory part of it Steal not, and in the Sanctional . . . or thou shalt be hanged. Nobody would be to be executed, nobody to be condemned, nobody to be apprehended, if nobody had been to be hanged: nor anybody to be hanged, if nobody were to steal. 37

The Directory part of a Law is the compleat expression of an absolute unconditional will: it may stand compleat of itself as a logical proposition, or as a grammatical sentence. The Sanctional part is the expression of a will of the Legislator that is such only upon condition. Omit the conditional particle, the particle or something equivalent that points to the condition; it may stand compleat as a proposition and as a sentence: it is the expression of a will: but of a will that being divested of the conditionality is not the Legislator's real one. Add the conditional particle, it is neither a compleat proposition nor a compleat

VIII *Parts of a Law* sentence: it is not the expression of a will: but only the fragment of such an expression.

| The next paragraph is to tell us that in the first place punish-
38 ments are more efficacious than words, which we were told before: and in the next place, that the words 'compelling' and 'obliging' and 'compulsory' are said of punishment, and 'persuading' and 'alluring' of reward: for which we are not much the wiser, although what is said of persuading and alluring is pretended to be deduced from a profound contemplation of the very 'nature' of it: and in the 1st place, that for all this, a Law's bidding a man to do a thing does not make it 'impossible' for him to do otherwise: which no mortal alive could have dreamt it should, but our Author himself: who in respect of some of the things he calls Laws has maintained the affirmative almost in these very words, as we have shewn already.

*'Legislators and their Laws are said to *compel* and *oblige*; not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation: but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the Law; since, by reason of the impending correction, compliance is in high degree preferable to disobedience. And even where rewards are proposed as well as punishments threatened, the obligation of the
39 Law seems chiefly to consist | in the penalty: for rewards, in their *nature*, can only *persuade* and *allure*; nothing is *compulsory* but punishment.'

And now to wind up this account of Law and its parts we have a little casuistry. The old story about the hold that the Law has 'upon men's consciences'. This passage merits peculiar attention. |

'It is held', says he, 'it is true, and very justly,' (so justly that he holds clean contrary himself) 'that human Laws are binding upon men's consciences. But if that were the only, or most forcible obligation' (meaning I suppose that of the sanction created by the Law itself, the political sanction as I call it) 'the good only would regard the Laws, and the bad would set them at defiance. And true as this principle is, it must be understood with some restriction. It holds, I apprehend, as to *rights*; and that, when the Law has determined the field to belong to Titius,

* I Comm. 57.

it is a matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties*, and such offences as are *mala in se*: here we are bound in conscience, because we are bound by superior laws (not then that we are bound by human laws) before those human laws were in being, to perform the one and abstain from the other. But in relation to those Laws which enjoin only *positive* duties, and forbid only such things as are not *mala in se* but *mala prohibita* merely, annexing a penalty to non-compliance, | here I apprehend conscience is no further con- 40
cerned, than by directing a submission to the penalty, in case of our breach of those laws: for' (observe the reason) 'otherwise the multitude of penal laws in a state would not only be looked on as an *impolitic*, *but*' (observe the opposition) 'would also be a very *wicked* thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; either abstain from this, or submit to a penalty; and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the Statutes for preserving the game, a penalty is denounced against every disqualified person that kills a hare. Now this prohibitory law does not make the transgression a moral offence: the only obligation in conscience is to submitt to the penalty if levied'.

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As to what it is that binds conscience, much more need not be said here, than has been said already. Reward or Punishment that is Pain or Pleasure annexed as a consequence to a mode of conduct. Reward or Punishment at the hands of men, liquidated by Law, forms the Political Sanction. Reward or Punishment at the hands of men, unliquidated by Law, forms the Moral Sanction. Reward or Punishment, at the hands of God, forms the Religious Sanction. Any of these if apprehended to be annexed will operate as if it were really annexed. Punishment | of that 41
sort which comes more immediately from God, is the only sort men in general, as far as they are agreed about the use of the word, or at least that our Author, will speak of as being binding upon *conscience*. It is the nature of the will (that is, of man in the business of volition) to be governed by motives and by nothing else but motives. Motives are the idea of pain or pleasure. If to the same faculty, *Will*, men will give the term *conscience*, when they speak of it as being acted on by pain or pleasure expected from causes that are invisible, which they refuse to it when

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spoken of, as being acted on by pain and pleasure expected from causes that are visible, there is no help for it. There is no harm in it, when it is known to be a question but of words: but till that is clearly seen, it is a source of confusion and error. The influence of an expected pain or pleasure is neither less nor greater from the subject that it acts upon being called will at one time and conscience at another. It is a means that the motive is thought to be something different of its operation in the one case from what it is in the other: although, come from whence it will, it is still but pain or pleasure.

Now then, as to the reason there is to look upon the Religious Sanction as annexed to human laws, whether it is greater in one case than another, and in what in particular, we shall be ready to consider.

Our Author makes distinctions, and the Italic characters are
42 set to work to put variance and sense | if possible, into words which have neither sense nor variance. Laws bind upon conscience, Laws have the Religious Sanction annexed to them, that 'determine' 'rights'; that determine natural duties, and create offences that are *mala in se*, that is, as our Author would have it thought, are ready to their hands. Laws do not bind conscience, Laws are not to be looked upon as having the Religious Sanction to them that create *mala prohibita*: that is, that create any offences that were not created without them. Here however is another distinction: tho they do not bind our consciences to *do* what they would have us *do*, they bind our consciences to suffer what, unless we so *do*, they would have us *suffer*.

And here to save that unamusing kind of blindman's buff that consists in playing with words whose meaning, when they have any, is not visible, I must lay down a definition: it is of the term A right: a legal right.

A right then to a thing, is, as I understand it, the relation a man is in with respect to a thing, which that man is left free to convert to the purposes of his own pleasure, punishment being denounced against any other man who shall impede him from so doing, or does the like as the first man with respect to that thing, without his consent.

Thus then stands the case according to our Author. The Law has given a right to *qualified* persons, as the phrase is, to kill
43 game. It has made | them owners of the game *in common*. For it

punishes all who kill it but these, and leaves them free. The same Law has given a right to Titius to the field that is called the field of Titius: for it punishes all but him who meddle with it, and leaves him free. I know no method more effectual, nor in short any other method, which using both directory part and sanctional together, it could take to give it him. This being the case, it is matter of conscience for persons and strangers not having right not to meddle with Titius's field, God is to be expected to punish those who do so. It is not matter of conscience to meddle with Titius's game: God is not to be expected to punish those who do so. Ask our Author the reason of this distinction, the only one is that so it seemeth good to our Author. And thus much for consistency. End of 43.

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Whether binding on conscience. Not paged.

The division of Laws struck out in this place by our Author, is worth attending to. There are five sorts of things he mentions as objects of the Laws 1. Rights 2. Natural Duties 3. Offences mala in se 4. Positive Duties 5. Offences mala prohibita: these 5 things are opposed to each other. The Laws that respectively concern them are different so that they serve to distinguish the Laws into 5 different sets of Laws. This at least seems to have been his notion, as far as I can judge: tho I am not quite certain whether the Laws concerning the 2d and 3d, as also the Laws concerning the 4th and 5th sorts may not have been considered by him as the same. If so, this will reduce our 5 sets of Laws to three. At any rate, the Laws whose business it is to 'determine rights' are contra-distinguished from those that are occupied in prescribing duties; and upon the first supposition, from those also that concern offences.

Whichever of these be our Author's notion, mine is very different. Mine is that rights, duties, and offences all arise out of one and the same Law. Nay that no right can arise out of a Law, but a Duty and an Offence spring with it. The truth of this may easily be made visible. Let Titius's field be brought once more upon the carpet. The Law gives Titius the *right* to it. How? By making it the *duty* of other men not to meddle with it, and by making it an *offence* in them if they do. That is, by appointing a punishment for those who do. For that is what the Law itself does. The affair of it's being *prescribed a duty*, and *created* an

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offence is only the language we use in speaking of what the Law has done. They are different turns of expression of our own concerning what the Law has done at *one operation*, by *one expression* of will: not different operations. Thus much concerning the distinction between rights, duties, and offences. In the midst of the profound darkness of our Author's discourse I am apt sometimes to think that owing to some obscure perception of what has been said, he did mean to speak of them as expressions belonging to the same acts, and to the same Laws concerning those acts, and that it is in *apposition*, not in *opposition* that he meant to place them. Be that as it may, it is certain that with respect to *mala in se*, and *mala prohibita*, he meant otherwise. By these he meant two entirely distinct sorts of acts, treated of by two entirely distinct sets of Laws.

It is in vain to regret that he has not given us a list of the sorts of acts that come under each description: a task this which had he imposed on himself, and gone about to execute, would probably have cured him of the notion of any such distinction. In vain should we desire so much as a specimen in this place. In another place indeed he has given one or more of the sorts of acts that come under every one of these five classes* (which makes it unquestionable that at that time at least he considered those demonstrations as relating each to a different set of acts) except that of positive duties. But words that like his differ in their meanings every time they are used ought every time to have a separate illustration.

We cannot therefore in this place shew that the distinction does not hold good with respect to any sorts of acts in particular, because he has mentioned none: some he did mention before, and with respect to them we there shewed as much. All that remains for us *here* is to shew that there is no ground for distinction with respect to any sorts of acts whatsoever.

* I Comm. 54.

[SECTION IX]

INTERPRETATION OF LAWS

Recapitulation.

WE have now accompanied our Author through [7] stages of his progress: through his account of the Law in general, though it is Law *in nubibus*—of the Law of Nature, tho there is no such thing: of the Law of Revelation, tho he had nothing to do with it. Of the Law of Nations, though it is one part no Law at all, and the rest a part of the sort of Law that follows after: Of the Municipal Law, the only Law he had to do with: tho he knows not what to make of it. Of the 4 Parts of a Law, one of those parts consisting more or less of many thousand whole ones. Of the hold that this Law has upon man's conscience: which he says is none at all.

Argument of the present Section. Interpretation of Laws—how to be performed—by whom. Construction of Statutes—a subsequent topic, liable to be confounded with this.

We now come to consider the receipt he has given us for finding out the sense of a Law when we have got the words: but first some short hints are given concerning who should find it for us, when we (private citizens) cannot do it for ourselves. I had like to have been mistaken, I mean, who should *not* find it out for us: that is, as he says, the Legislature: for who else should, or whether anybody else should, is what he thought not worth the telling.

Before we proceed further, one thing, for the sake of such as may wish to have their ideas | [2] of things made clear, ought not to pass unnoticed. Now it is of a *Law* he speaks and of the method of *interpreting* a Law. He speaks in his next section of a *Statute*, and the method of *construing a Statute*. People in general when they speak of a *Law* and a *Statute* are apt to mean the same thing by the one as by the other. So are they when they speak of *construing* and of *interpreting*. Our Author it is plain does not; since after saying what he had to say about the method of *interpreting* a Law in this place, he takes up the affair of *construing* Statutes as a new subject, as if nothing had been said upon it before. Five rules he lays down for the *first* of these two operations: and twice as many quite different ones for the *second*. Five *sets* of rules indeed I should have said: for the first article which is numbered as one rule consists of three: and those three much more different from one another, than some of them are from some of those that are placed in distinct articles. Be this as it may, it is | plain, I

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say, with *him* there is a great difference between the *interpreting* of a *Law* and the *construing* of a *Statute*. Wherein that difference lies, between things so liable to be taken for the same, it would not have been amiss in him to have told us. He has done no such thing. I will endeavour to do it for him, after I have attended him through what he has said of the articles themselves. The difference between the two could not now be so commodiously explained, as after the account he gives of each of them has been examined.

Rescripts disapproved of by our Author.

Who shall be the Law's interpreter? A question this that opens into a large field of inquiry. To take a full survey of it is a task too long to be attempted here. It will be enough for us to shew how little a way into it our Commentator has seen. 'When any doubt', says he, 'arose upon the construction of the Roman Laws, the usage was to state the case to the Emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the Legislature to decide particular disputes, is not only endless but affords great room for partiality and oppression. The answers of the Emperor were
4 called his rescripts, and these had in succeeding cases the | force of perpetual laws;' . . .

Question concerning the Interpreter ill-distinguished from that concerning the method of interpretation.

This then is one 'method of interpretation' which it seems he *does not* like: he says it is a '*bad*' one. In the next paragraph he comes to another method which he does like: he calls it the '*fairest and most natural*'. 'The fairest and most natural method to interpret the will of the Legislator, is by exploring his intentions at the time when the Law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the Law'.

Thus clear is he in his distinctions. This by the *signs* and the preceding one by the Legislature are both spoken of as '*methods of interpretation*': seemingly opposed to each other, and the preference given to the latter. But suppose the Law is interpreted by the Legislator, and he interprets it by the signs? Is it a fair and rational method of interpretation then? or what is it? Of a piece with this criticism would be that of him who should stand up and say: 'There are two "methods" of doing a piece of work: that *by* the *workman*, and that by the instrument. The first of these methods is a bad one. The second is that which is fairest

and most rational'. It is time to offer a few hints to elucidate this confusion. The particular account given of these *signs* he speaks of will be considered afterwards. IX *Interpretation of Laws*

| [5] A Law, be it what it will, to be observed, must have a meaning put upon it. In the first place, at all events, by those who are to observe it. A Law there is, suppose, upon a given subject. The words of it are given. The task of putting a meaning upon those words rests as everybody sees in the first place upon those persons. But they find a difficulty in it. The first question therfore is, *how* anybody that it belongs to, they in the first place, are to go about to solve this difficulty? *how* is the Law to be interpreted? upon what plan of investigation? By considering these signs that I tell you of, says our Author: which are 'the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the Law'. How intelligible each of these signs is in itself, and how distinct it is from the rest, shall be considered presently. Meantime thus far we are advanced. The above, such as it is, is his answer to the question: *how* a Law is to be interpreted. Question concerning the method of interpretation new-stated.

But the persons who are to observe, having taken this method, or any other method, and not being able to interpret it, or if two parties are concerned, not being able to agree about interpreting | [6] it after all, would be glad to have somebody to do it for them: that is, somebody in whose power it should be, to make the conduct observed by the Law conformable to what he should predict, as the consequence of the party in question embracing that in his conduct which the interpreter declares to be correspondent to it. An example or two may be necessary to make this clear. Concerning a common interpreter. Powers requisite.

There is a Law, suppose, concerning State-libels, distinguishing what shall and what shall not be deemed a Libel, and punished or tolerated accordingly. (Would to God this was, as it might and ought to be, more than supposition!) I think it of use to communicate some observations concerning the conduct of affairs: but am afraid to do it, doubting, tho with the Law before me, whether what I have to say, would or would not be deemed a libel. Example for a Law against Libels.

There is an assemblage of Laws concerning Testaments: part of them employed in declaring what sort of dispositions by Testament shall or shall not be valid. (Would to God that this also Concerning Testaments.

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were more than supposition!) I am about to make my will: I mean to make a particular disposition of a part of my estate: but tho with the Law before me, I cannot satisfy myself whether that disposition is among those that it pronounces to be valid.

7 Now then I have had recourse to our Author's | signs: I have had recourse to what other assistances I could think of for understanding of the Law: but all in vain. I want somebody to do it for me. But the somebody to answer my purpose fully, must be somebody who can make the conduct of the Law in either case answerable to his prediction. Who can and will in the first case make the Law punish me as for a Libel for publishing my observations, if he thinks that according to the meaning of the Legislature those publications ought to be deemed a libel: who can ensure me against punishment, if he thinks they ought *not*.

Who can and will in the second case cause the part in question of my estate to go according to the disposition I mean to make of it, if he thinks that according to the meaning of the Legislator that disposition ought to be deemed a valid one: that is, by punishing any who shall attempt to deal with it otherwise than as I have appointed: who can and will by like means make it go according to any valid disposition I may have made succedaneous to this or to the ordinary succession in case of no such disposition, who can and will, I say, do thus, if he thinks my disposition ought *not* to be deemed a valid one.

8 | A *second* question is therefore, whether there ought to be any such common and authoritative interpreter as I have been describing? Whether by any one, and if by any one, then a *third* question is, by whom, if the party fears to do it for himself, ought the Law to be authoritatively interpreted.

Queries concerning the use and choice of an interpreter.

Not by the Legislator says our Author, positively and laconically: without exception or modification: and this is all he says. And yet questions there are several upon the subject besides this, and intimately connected with this, well worthy to be answered. Questions which must be answered before this can be answered to satisfaction.

Is it not to be wished that a man could know for certain, the legal consequences of his doing an act before he does it? Is it not to be wished that a method could be adopted whereby a man meaning to conform to the Law might save himself from punishment (I mean *extraordinary punishment*) in one case, from disap-

pointment in another, from litigation (which to be unsuccessful in subjects to punishment) from litigation, I say, in both? If it would be '*endless*' under a numerous and compounded Legislature, would it also be endless under a single one? Was it not | actually practised for ages in the instance he himself alledges, and was it then '*endless*'? If under the Legislature 'it affords great room for partiality and oppression', are there no means of obviating that partiality and oppression? Could there be any such thing as partiality and oppression if the names of the parties were kept concealed? Is there any effectual means of keeping concealed the names of parties transacting with great bodies? Are those means found effectual that are practised by many learned societies with respect to candidates for premiums in order to keep *their* names concealed? Could they be made more effectual than they are? At any rate, could they or could they not be transferred to the candidates for interpretation at the hands of the Legislature?* IX *Interpretation of Laws* 9

Persons whose | business it is to interpret thus authoritatively *after* the step has been taken, and in consequence of the litigation that may ensue for it there are already—I mean the Judges. What are the difficulties in their doing the same thing before the step taken and to save the litigation: To save the ill consequences of unsuccessful litigation? to save the re-surrender, for example, of a purchased estate, after the purchase money is dissipated and is irrecoverable? Is there no remedy to those difficulties? If none, are they greater than advantages would be of such an institution? Judges have shewn a just discountenance to collusive suits instituted to prejudge the right of a stranger not present to defend himself.† Do the reasons for such discounten- 10

* The collection of the Laws of Poland is full of cases propounded by private persons and resolved by the Legislature. These cases are proposed under feigned names. The Legislature of Poland is and at that time was a body more numerous than our own. From all this I mean not, however, to infer anything conclusive in favour of such a scheme of interpretation. See Falco Algidius.

† A well-known little history may serve here for an example. A once celebrated courtesan, Constantia Phillips, claimed to be the wife of a Mr. Muilman. The suit instituted by her in that view, was still depending. To give repute to her claim it was concerted, that an action should be brought against her as a single woman, that she should plead this marriage go to trial upon that issue, give such evidence as she had to produce, none be given on the other side, by which means it was hoped a verdict might be obtained for her as

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ance hold with respect to questions submitted by the parties themselves that are interested in an act, submitted I say before that act is done? Our Author had he attended to a few questions such as these might have been less lavish of his learning upon Rescripts: and less forward to decide upon a question which nothing called upon him to start. Learning is a good thing; but judgment is a better.

Means of making the want of one less felt.

Thus much for our Author: but I will not omitt | [11] this opportunity, because I would not omitt any opportunity of inculcating what cannot be inculcated too often, whether it be expedient or no for the Legislature to institute any such plan of interpretation ex-ante-facto, one thing cannot be otherwise than expedient: and that is to narrow the occasion for such interpretation, by transforming the rule of conduct from Common Law into Statute Law; that is, as I might say, into Law from no-Law: to mark out the line of the subject's conduct by visible directions, instead of abandoning him in the wilds of perpetual conjecture.

Decisions confounded by him with Laws.

| [12] To return to our Author—'The answers of the Emperor' (says he) 'were termed his *rescripts*, and had in succeeding cases the force of perpetual Laws: tho they ought to be carefully distinguished from those *general* constitutions, which had only the nature of things for their guide'.

He had better have said 'had the force of decisions after litis-contestation: serving like them as a basis for fictitious general Laws to be formed from by abstraction.' For that is all the force they could have in perpetuity: since as Commands the force of them was spent upon the particular parties, and the particular points of their conduct they were meant to regulate.

Nature of things an expression without meaning.

As to 'the *nature of things*' so glibly spoken of, he must be more than a '*rational civilian*' who can tell what sort of 'constitutions' those are of, that in contradistinction to others, have *that* only for their guide. These I might say (tho without saying anything that is worth saying) had, I suppose, the nature of the *case* they were pronounced upon, for their guide: but what sort of a 'guide'

the Defendant. Being a wife she would not be answerable for debts in her own person. The Court of King's Bench before whom it was brought treated the project as an offence of that sort which is stiled a contempt of Court, and punished accordingly the parties and their attorneys. This however, one cannot help observing as to the punishing part of it, had much the air of an ex-post-facto Law.

'the nature of *things*' is to make for 'a constitution', or what meaning the phrase, smooth as it is, has here, is what I must confess myself unable | [13] to conceive. When he speaks of 'general constitutions', he speaks to be understood; I am apt to suppose I understand him: but when he goes on and talks of 'the nature of things', I see him wrapped in clouds, and I am sure he does not understand himself. IX *Interpretation of Laws*

'The Emperor Macrinus as his historian Capitolinus informs us' (continues our Author) 'had once resolved to abolish these rescripts, and retain only the general edicts; he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as Laws. But Justinian thought otherwise, and he has preserved them all'. Our Author might have added, since he was in the humour of passing his judgment, that both these Emperors acted as if they had him for their Chancellor. To enquire *when* all these rescripts were, instead of inquiring *what* they were, and to abolish *all* of them in the lump because *some* of them were by Commodus and Caracalla: to turn his thoughts to the reverence that might be paid to them as the acts of the Emperor, instead of the benefit that might accrue from them to the subject as shutting up so many sources of litigation,—all this was perfectly of a piece with our Author's penetration, and with the depth and largeness of his views. The best thing these Emperors could have done was to draw off in the shape of 'general' | [14] constitutions (to use our Author's term) as much in density and as little in bulk as they could, and to throw the caput mortuum into the fire: The next best thing would have been to pick out and preserve in statu quo what seemed to them the best, resolving all along to know nothing of the authors. Puerile conduct of two Emperors concerning ancient rescripts varnished by our Author. What they should have done.

'In like manner', continues he, 'the canon Laws, or decretal epistles of the Popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals'.* Rash aphorism of his in Logic.

* As to the *particular application* of this concluding aphorism, it is more than *I* can comprehend. As to the *general aspect* of it, *any one* can see that it is false. The only form of reasoning by which instruction is to be acquired, by which Bacon, for example, and Locke and Newton learnt what they have taught us, is that which proceeds from 'particulars to generals'. Induction is that form. To what Locke in particular has taught us on this head, our Author, one should think ought not to be a stranger.

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Thus much concerning the interpreter. We now come to examine at large what he says concerning the method of interpretation. How is the party who is to act, or anybody else who may undertake it for him to go about to find out the meaning of the words where it is not obvious? What helps is he to resort to? What circumstances is he to attend to? To certain '*signs*' answers our Author: and there are five of them: 'these are the *words*', one: 'the *context*', two: '*the subject matter*', three: 'the effects and consequence', four: 'the spirit and reason of the Law', five.

The words, we are to remember, must be given. And these signs he speaks of are helps to be taken by which to 'explore' the
15 meaning of those words. The first of | these helps, these 'signs' is neither more nor less than the words themselves, and these make one of those signs which he pronounces to be natural and probable. If this be something different from what is intelligible, I cannot help it.

Be this as it may: under the title of *Words* he gives us three rules, intelligible enough indeed for anything they are good for, had they been better introduced.

First rule of interpretation under his first head.

The first is, that 'Words are generally to be understood in their usual and most known signification; not so much regarding the *propriety of grammar*, as their general and popular use'. The upshot of this rule is, that words are generally to be understood in that sense that people would be apt to understand them in, were there no rule given about the matter. Now against the propriety of this, certainly nothing can be objected: but what use there was for making a rule to bid us do what by the supposition we should do without bidding, is what I shall leave to be considered.

Example.

The example he gives us under this rule is that of a 'Law

Locke's Book on Government he has read, I suppose, since he has quoted it; and taken from it some of that which is least worth taking. The Essay on Understanding let us hope he never read, being so little the better for it. If he had, from that he might have understood how much is to be learnt by *induction* and how little by any other 'form of reasoning'. Even his own Saunderson might have informed him that there is such a form of reasoning as induction: that the nature of it is to argue from particulars to generals, and that notwithstanding this, it is a 'true' one. But his misfortune was the good old verse our Author used to con over to his tutor, '*Syllogizari non est ex particulari*', was, I suppose, still jingling in his ears.

mentioned by Puffendorf, which forbad a layman to lay hands on a Priest', and which 'was adjudged to extend to him, who had hurt a priest with a weapon'. This judgment, in our Author's opinion, I suppose, was a proper one: 'to hurt' by any | [16] means whatever, was then 'the usual and most human signification', 'the general and popular use' of the phrase 'to lay hands', to lay hands *simply*, without hurting, the '*grammatically-proper*' one: Not that the rules of grammar by the bye have anything to do on either side. This may be for aught I know, the case: tho I wish our Author had found out since Puffendorf could not, some example whose pertinency to the rule was less equivocal. What the Law was *in itself*, I recollect not: nor is it worth while taking down Puffendorf and the book he cites for authority, to enquire. Our business is only with what it appears to be upon the face of *this account* of it; and upon the face of this account of it there seems reason to doubt whether the general and popular use is so explicitly decisive in favour of his sense as he supposes. I know not that the general and popular sense of the phrase 'to lay hands' decides for what purpose it is the hands are laid: *that* must appear by the context: and the context may decide it to be for any number of purposes.*

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The general and popular use therefore I take it decides nothing: it is the *end of the Law*, if it appeared, that must decide. The end of the Law, of which our Author says nothing: tho it is a term so much more explicit than *spirit* and *reason*, the terms he has mentioned that came nearest to it. The end of the Law is the suppression of the supposed mischief that gave occasion to it, when it is a mischief; or the procurement or advancement of the benefit, when it is a benefit. The end of the Law I should be apt to suspect, from what here appears of it, was, to save Priests

* I may *lay hands* on a man to save him from falling into the fire, into the water, or out of the window: as well as to hurt him. I might *lay hands* on [17] our Author to save him from venting such crudities as his to serve as Institutes of Jurisprudence, under the quaint name of Commentaries: in doing which, whether I should hurt our Author or no, I think I should not have much hurt the public. I might *lay hands* on a man to bless him: as was more the fashion once than it is now: which would do him neither good nor harm: unless I were a Bishop; and in blessing him meant to make him a priest: in which way it has been the opinion of a popular writer speaking from experience, and indeed not without some colour of reason, that much mischief may be done.

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not from | [18] lawless violence, not from being hurt by a weapon or anything else; but simply from being laid hold of, from being apprehended by the ordinary officers of Justice who were laymen. For this purpose there might well be a new precise act of the Legislature passed at a given period: prescribing a remedy against the newly-imagined mischief: for as to the hurting of a priest by an act of lawless violence, under whatever government it was, that must all along have been punished, so long as a priest was deemed a man. Thus much at least seems certain: either this must have been the purpose of the regulation, viz.: to make an act originally legal as being done in pursuance of the process of the Law, no longer legal when exercised on such an object by such agents: or to make an act originally illegal, more penal when committed on such an object by such hands, than it was before. According to the latter supposition only, which seems the least probable, as the prohibition is directed so specially to laymen, could the decision be a proper one: unless the hurt with a weapon appeared to have been given in pursuance of an attempt to apprehend.

Second rule under the first head Technical Terms.

The second rule given by our Author under this title is—'Terms of art, or technical terms, must be taken according | [19] to the acceptation of the learned in each art, trade,' (occupation he might have added) 'or science'. This rule, as it stands here, is in point of use, about as much as comes to nothing. A term may be technical *ab origine*, or technical by adoption. That is, the sense it has may be what has been given it for the purposes of a particular art by persons conversant in that art, without its having ever been used by persons at large: or else it may have had first an ordinary sense known to persons at large: and then have had one that is different, (tho analogous) given it for the purposes of such an art. A term that is technical may, in the second place, be technical either singly, or only in conjunction: a phrase or assemblage that is technical, composed of words that singly taken, are not so.

If then the term or assemblage of terms in question be of the sort of those that are technical *ab origine*, the technical sense is its 'usual and most known signification': for it is the only one in which it is at all used or at all known. Either a man understands
20 it in | that sense, or he understands it in none at all. In the first case he has no occasion for that or any rule; and in the second it

can be of no use to him: For all that it does for a man so circumstanced is to say to him, if you can't tell the sense of a word yourself, go and ask what it is of those who can. Let us take for examples the words Borax, and Certiorari: both of them technical terms used by the Law: the latter of them of its own creation: the first of its adoption. Borax is a species of salt which the Law takes notice of, by laying duties on it. If a man is a Chymist or a Druggist or a Drysalter, or happens to know so much of these occupations, he knows what Borax is. He has no occasion for this rule or any rule about the matter: if not, what is he the better by the rule? just as much as a man is the better for being told to do, what he could not have avoided to do without telling. Certiorari is the name of a written instrument used in Law. If a man knows so much of Law, he will understand what is meant by a Certiorari. If not he will see that he does not know it. If then he does *not* choose to be at the pains of enquiring what it means, it is not this rule that can inform him: if he does, but knows | not where to enquire, it is not this rule will tell him 21 where. If he knows where to enquire, and does enquire, then he may learn: no thanks, however, to this rule.

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Examples Borax Certiorari

The truth is, it is not this nor any rule concerning technical words, that can be of use for the purpose of *instruction*: the only purpose it can serve is that of a *caution*: and that not in the case before instanced where the sense the word has can evidently be no other than a technical one: but where it has an ordinary sense, and over and above that, a technical one. The ordinary one is that which will naturally first suggest itself: at least to a man who is not much conversant in the art &c to which by its technical sense the word belongs. It may be of use therefore to put him upon his guard, by advising him to look out for a further sense than at first sight he would suspect in it. The caution is more particularly needful (or rather this is the only case in which it is at all needful) where the ordinary sense which is not in fact intended will form with the other words in the sentence a proposition so far plausible, as not to be recognizable at once for such an one as *could* not have been designed.

Rule concerning Technical terms good only for *caution*.

| [22] The last rule he gives us under this first head is as heterogeneous to the preceding ones as can well be imagined. In them he had been laying down the methods of making out the meaning of a Law from the words of that same Law: now he speaks of

Third rule under the first head —Repugnant Laws.

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what is to be done with two Laws that are opposite, when there is no doubt of the meaning of either of them. This under the title 'words'; the first *sign* as he calls them, of what they mean themselves. In the succeeding rules, which are ranged in different articles, and under the different titles, he still speaks of the words, tho under titles different from that of the words: but he comes back to the same Law; after speaking under the same title of the same Law and of a different one—Thus clear is he in his arrangement.

23 | 'Lastly', says he, 'where words are clearly repugnant in two Laws, the later Law takes place of the elder. Leges posteriores priores abrogant is a maxim of universal Law, as well as of our own constitutions. And accordingly it was laid down by a Law of the 12 tables at Rome, quod populus postraneum jussit, id jus ratum est.'

All this is undeniable: and when he was about it, it would not have cost him many more words than it took to tell us of its being a maxim of universal Law, to have given us the reason why it could not be. If the Will of past races of Legislators has the force of Law at all, it is only because it is tacitly adopted by the present. Will without power to back it is just nothing: and dead men can no more strike blows, than they can tell tales. In the infancy of Legislation, we are told of a time when it was a kind of doubt, whether the acts of departed Legislators were binding: it would be odd enough, had such a doubt ever been formed concerning the acts of those for the time being. As to the words universal Law, they almost make me tremble, for fear it
24 should prove akin to the natural | Law, and those other Laws, that in the way he handled them gave us so much trouble. However, tis, I believe, no more than his way of telling us, that this notion was as much recognized by every other nation as by ours.

[Cancelled paragraph repeated in slightly different form, concluding:]

. . . all that he meant by the passage was to give us to understand in a sublime and mysterious way of his own, that this is the case under all other legislatures as well as our own. We may
25 venture to believe him; since the reason we | have found for it, holds good with respect to one as much as to another. In this method of proceeding, which our Author very consistently adheres to, he knows very well what he is about.

There are two ways, he knows, of teaching a science that is abstruse: one is to teach it so as to make it understood, and being understood, not to be abstruse. This is difficult; and what a man gains by it, is to make his hearers satisfied with themselves. The other way is, so to teach it as to leave it unintelligible: yet so to manage, as that the hearers should attribute their not understanding rather to their own unfitness to learn, or that of the science to be taught, than that of the Professor to teach: a notion they are apt enough to entertain, considering that it requires a knowledge which by the supposition they have not got, to cure them of it. All that is necessary then, is to treat them with a shewy phrase or two to carry off, as nurses do children with a painted fiddle or a gilt-gingerbread watch, to let them shew they have not been to the fair for nothing. This way is much the easier of the two: and what the Professor gets by it, is to make them worshippers of the Professor, | whose dignity is enhanced by the 26
mysteriousness of the science he professes. There is another great advantage the *uninstructive* way of teaching has over the *instructive*: speaking unintelligibly, he may all along keep fair with the prejudices that are in fashion: speaking all along the plain truth, he may be obliged ever and anon to strike out light very offensive to the eyes of those, who have the distribution of those things which are pleasing in his own. The observance of this sort of policy in the *moral* department of Science, is yet the most approved receipt for rising in the world: the permanent establishment of a man's fame not being much regarded, when if the fame falls, it is in general not till after it has lifted a man to the eminence he aspired to. This sort of policy I say is not hitherto out of vogue: but I think I see, and I rejoice to think so, that the growing discernment of the nation makes it every day less and less a prudent one.

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Meantime the comment here given it will be observed, arises not more naturally out of this text of our Author than out of a thousand others: | yet perhaps, wherever placed it may not be 27
altogether without its use: let us now return from our digression.

'If words' (continues our Author under his second head) 'be *still* dubious,' (tho' his last preceding case supposed them clearly to be otherwise) 'we may establish their meaning by the context; with which it may be of singular use to compare a word, or sentence, whenever they are ambiguous, equivocal, or intricate.'

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One might here be at a loss to understand what the context means, if it is not the words of the same Law, which is what anyone would naturally suppose it to be. Here then, when unable to make out the sense of a set of words, we are once more sent to get assistance from *themselves*. For the context in a Law without further explanation must be understood to mean the words that are in that Law. But to do our Author more than justice, we will suppose him to have observed a precision he has not observed; and to have given us to understand, that under the head of words, he had meant to speak of a given word or short assemblage of words, parcel of a Law, of which words the meaning
28 was matter of doubt: and that | under the head of context, as a further means of finding out that meaning than he had spoken of before, his purpose now is to recommend the comparing them with those remaining words of the same Law, the meaning of which, by the same supposition, is out of doubt. The *Context*, in a Discourse, from (*Con* = together with) and (*texus* = to weave) is that which is *woven up together with* something else: discourse with the words supposed difficult to understand, in the present case. This being the meaning of his rule, there certainly can be no harm in it: but it remains to see what good there can be in it, until it can be shewn what probability there is of a person's ever failing in the case supposed, to make such comparison of himself.

But as it happens we have *further explanation*, and that explanation is given by an example: by which it now appears that by the context of the sort of discourse called a Law he means, not anything that is *in* the Law, but something, which tho connected with it, is *beside* it. He means, for example, (but whether he means anything else beside the sort of thing brought for example,
29 I cannot tell) he means | the *proeme* or *preamble*, where there is one. '*Thus* the proeme', says he, 'or preamble is often called in to help the construction of an act of Parliament.' Which construction by the bye is to be the subject of a different set of rules, ten in number, that are to be given hereafter in another place.

The Preamble of a Law is something that is different from and beside the Law, that forms no part of the Law, and does none of those things which it is of the nature of a Law to do, that forbids nothing, nor commands anything. What it contains is mere historical matter, being ordinarily a brief relation of the inducements that are thought proper to be assigned for the commanding

what is commanded, or forbidding what is forbidden. A declaration of certain supposed matters of fact the consideration of which determined the judgment which declared the volition expressed by the Law. And now we are got away again to *other* Laws: by which immediately after, he very adroitly expresses himself, *in terms*, to mean the *same*. 'Of the same nature and use', says he, 'is the comparison of a Law with other Laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, | when 30 the Law of England declares Murder to be Felony without benefit of Clergy, we must resort to the *same* Law of England to learn what the benefit of Clergy is: and when the *Common Law*' (what sort of a Law have we got now?) 'censures simoniacal contracts', (that branch of the Law of England he might have said, called the Common Law) 'censures simoniacal contracts, it affords great light to the subject to consider what the Canon Law' (what is this same *Canon Law*? another branch of the Law of England or what besides?) 'which the Canon Law', however, concludes he, 'has adjudged to be Simony'.* IX *Interpretation of Laws*

* *Precision*, (if we may be allow'd to make a Grace, or a Virtue of her,) is in general no great favourite of our Author's, and it happens whimsically enough that while in a sudden fit of gallantry, he is throwing his arms about to catch her, he stumbles into ambiguity and contradiction. This came of decking his sentence with the word '*same*', in which there was no more *propriety* than *use*, seeing that he was neither about Conveyancing nor Special-Pleading. What gave it this uncouth effect was a point of ambiguity our language labours under, which our Author wanted vigilance to provide against. Between this sentence and the preceding, the word (Law) in his hands, had changed it's signification: meaning in *that*, some individual detached Law: in *this*, the fictitious whole, resulting from the assemblage of all together. What he had been speaking of *there* was, the comparing of a Law, meaning an individual Law, with *other* Laws, meaning other individual Laws. What he meant to speak of here was 'resorting' (in order to make that comparison) to the Law of England that he chose to instance, meaning the body of the Law of England, containing some such individual Law as was to be compared to others, as well as those others it was to be compared with. Had this been all, it might have passed: the term Law tho' *equivocal* would not have been *ambiguous*: because the context would have served with tolerable readiness to distinguish it's two senses. But the word (same) he prefixed to it, shew'd as if put in opposition to the word (other) '*other Laws*' in that preceding: in which case the meaning would be, that as in the rule we were to compare an individual Law with other individual ones: we are now to resort, for *example*, to the same, that is the same

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For the purpose of the exemplification, it may be sufficient to understand, that the Common Law is one sort of Law, that is supposed to speak | [31] of Simony: and that the Canon Law is another sort of Law that is supposed to speak also of Simony: and that if we are not satisfied about what belongs to it from the first, it may be of use to see what is said about it in the second. But as there are some people who like to see everywhere as they go, tho cross roads as well as the main one, a word or two more may be of use concerning this example.

What one should have been glad to have known for this purpose, is, of whose making this offence, this simony is supposed to be, which the Common Law is supposed to censure? Because if it is a Simony merely of its own making, if it is that it censures and no other, to consider what the Canon Law makes simony will afford no light at all. If the Common Law has no such thing as
32 Simony of its own making, but takes it | from the Canon Law, then to consider what the Canon Law, so far as it is thought proper to admit it makes Simony, is what 'affords to the subject' not '*great* light' merely; but *all* the light it can receive.

Third Sign the Subject matter.

③ This brings to our Author's 3d sign, whereby to find out the meaning of a set of words that make a Law: and that is the subject-matter. And by this one should be glad to know what is meant, and by this our Author gives us no means of learning what is meant, other than an example: which example is such as would fit exactly two of the rules concerning the two first signs from which this sign is meant to be distinguished: namely the second article of the first groupe of rules given us under the title of his first sign: I mean that concerning technical words: as also the second rule, namely that concerning his second sign, the *context*. 3. 'As to the subject-matter', continues he, 'words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the | Legislator, and all his expressions
33 directed to that end.'

Subject matter of a Law— what.

I will give you my notion of what the subject-matter of a Law may be, since our Author has not thought it worth his while to give us his. What is meant by it, is a matter that he imagines

individual Laws. Thus is a harmless equivocality so improved by a useless added term put into such an expression, as but for it's manifest contradictoriness to a preceding one would appear ambiguous.

He saves himself from obscurity by stumbling on contradiction.

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everybody is clear about, but which I am apt to imagine everybody is not clear about, himself for one. By the *subject-matter* then, I mean the sort of thing that is the subject (or object, the use of these two words is not well distinguished) of the sort of act which the Law is made to prohibit or to command, the subject on which that act is exerted. This indeed is no other than one would suppose *his* notion of the thing to be, to judge simply from his example: but to come at the subject-matter (there is no other way) we must get at it by the words. As it happens, the word that *seems* to be marked by our Author as expressive of the subject-matter (for it is printed in italics) tallies exactly with this definition. I say *seems*: for that this is the case, is more than he has told us. Our Author scorns to stoop to the drudgery of speaking plain. 'Thus,' continues he, 'when a Law of our Edward III forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain or other victual: but when we consider that the Statute was made to repress the usurpations of the papal | See, and that the nominations to 34
vacant benefices by the Pope were called *Provisions*, we shall see that the restraint is intended to be laid upon such provisions only.' '*Provisions*' I say is the word that seems to be marked here as expressive of the subject-matter: and this, which is precisely the word that should express it according to our definition: ambiguity in the words that is to be solved by the consideration of the subject-matter. And yet, if he had been in any degree clear about the meaning of it, I cannot persuade myself that he would ever have given us such a rule.

I do bespeak on this occasion the favour not to say the gratitude of the reader, and do entreat him to give me some credit for the pains it must cost to dissipate the extreme confusion in which the whole article is involved. The words, we must still remember, are given: for the Law itself is given: and the words are what compose it. Of these words, there is difficulty in our coming at, or there is danger of our not coming at, the true meaning: they are, some of them, ambiguous or deceitful: one only we will suppose for the example's sake. It is necessary to call in assistance, to make their meaning out by: and for assistance our Author is giving us his five *signs*. He is now upon the third of them: which he calls the subject-matter. In the words there is an ambiguity: | which we are desirous to have solved: to solve it 35

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therefore, he here gives us, the *subject-matter*. Now a question that may be put is, how we are to come at this same subject-matter? By the words, according to my notion of the matter, or not at all; by inspiration it should seem, according to him. Of the assemblage of words that constitutes the Law in question, some single word of some smaller assemblage of words is that which expresses the subject-matter. In the example it is a single word, the word *Provisions*. This word then, as our Author's evil stars will have it, which is designed to express the subject-matter, is the very word, and the only word concerning which there can be any room for doubt: and the consideration of the subject-matter thus expressed but imperfectly expressed is that which the Author gives us by this rule of his, to put the matter out of doubt. What we wish to do without being able, is to know what it is, that *is* the subject-matter. To satisfy us then he proposes to us the consideration of this same subject-matter as a thing we know already.

I give that material part of the Law I suppose he means (for he has not cited it) at length: since happily it is a short one, tho as long again as needful. It is a pleasure were it only for the variety's sake, to see a Statute that is no more than twice the length it need be. In those days, it seems, they possessed
36 the secret of drawing | short. That secret is long since lost.

'Also because certain persons purchase at the Court of Rome *provisions* (to have Abbies and Priories in England) in destruction of the Realm and of holy religion; it is agreed and consented to that every person who purchases such provisions (concerning an Abbey or a Priory) that he and his factors and sollicitors that sue out and carry to effect such provisions shall be out of the protection of our Lord the King'—then it concludes with other penalties.*

We are now prepared to see how unfit this is to serve as an
37 example to a rule | for finding out the sense of the words of a

* The original is in obsolete French, and is not translated in any of the editions. It runs as follows:

'Auxint pur ce qe ascuns purchacent a la Court de Rome provisions davoir abbeies et priories en Engleterre en destruction du Roialme et de seinte Religion acorde est, et assentue qe chescun qe purchase tieles provisions dabbeie ou de priorie qe lui et ses executours et procuratours qe suent et fount execution de tieles provisions soient hors de la protection nostre seigneur le Roi.' Ruffhead's edition, vol. i, p. 267. [25 Edw. 3. stat. 5, c. 21.]

Law by the subject-matter: and at the same time, how unfit it is, as has been already intimated, to serve as an example under two former topics: that concerning the look-out to be kept against technical words, and that concerning the use to be made of the context. The very word that is designed to express the subject-matter (the word *provisions*) is a technical one: being of that insidious sort of technical words (above noted by us) that besides its technical sense has one that is common and familiar. The common one is that in which the ordinary run of readers might be apt to take it: and certainly would take it if it were not for certain words that accompany it. These words I have included in brackets. These words are what may be stiled in relation to it, the *context*. They are interwoven with the body of the Law; as also more explicitly with the preamble: this Law being drawn up according to a plan which Lord Bacon justly stigmatizes as vitious, that of the retroflection (by means of a word of reference like the word *such*) of the body of the Law into the preamble. It is the word expressive of the subject-matter, therefore, that is ambiguous: it is the context that explains it: and this is the manner of its explaining it. It serves as an adjunct | of 38 *specification*; limiting the meaning of it, and at the same time shewing it to be a species of a certain genus: which genus from the exemplification of it appears to be one entirely different from that one might otherwise have expected. It is not the purchasing provisions in general (as this part of the context declares) that is meant to be prohibited, but it is the purchasing that sort of provision which is a 'provision to have Abbies and Priories in England'.

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What is remarkable is, that in the very passage the purpose of which was to refer the means to the head of subject-matter; an article expressed *in* and *by* the Law: he himself expressly refers it to another topic that is *without* the Law: I mean, the *end*. The end of a Law, as I have already intimated, is either the suppression of some mischief: or the attainment of some benefit. In this case it is the suppression of a mischief: 'the usurpations of the papal See': which mischief he has been recommending to consider: 'when we consider that the statute was made to repress the usurpations of the papal See, and that the nominations to vacant benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only.'

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Thus much for his 3d sign. The fourth and fifth I must consider together. They are distinguished |[39] indeed in words, and made separate articles of accordingly: but how they are distinguishable in idea, is more than I can say, Each indeed has its separate example: but the example of one may do as well for t'other. In this however we mend a little. In former cases the example would do *better* for some other rule than that it was annexed to: sometimes for almost any other except *that*. Now it *will* do for the rule it belongs to, tho for another which it was to serve to distinguish from *that*, it will do equally as well.

The 4th is 'the effect *and* consequence': the 5th and last sign is 'the reason *and* spirit'. 'As to the effects and consequence the rule', says he, 'is, where words bear either none, or a very absurd signification, if literally understood, we must a *little* deviate from the received sense of them' (but where we are to turn to when we deviate from them is what he has not told us) 'Therefore the Bolognian Law, mentioned by Puffendorf, which enacted "that whoever *drew blood* in the streets should be punished with the utmost severity", was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.' 'Effects and consequence'—effects of what? and consequence of what? of the Law or of the act that it prohibits? What is '*the effects*', and what is '*consequence*'? Are they the same, or different? If different, wherein consists the difference? How much of the example belongs to '*effects*', and how much to '*consequence*'? And what is it we are to do with either of them? how are they to help us? | And what, in short, is it that the example has to do with either of them? All these questions we may put as long as we think proper: no answer shall we get to any of them from our Author.

This rule, I said, might change examples with the next, to which we are coming presently. It may also with the first of the first groupe of rules importing that 'words are to be generally understood' . . . according to their 'general and popular use'. The example there is, a Law forbidding a Layman to *lay hands* on a Priest. The example here is, a Law forbidding any man to *draw blood* in the streets. Both phrases in their strict import are incommensurate to the *end*. The first of them is too narrow: the second is too wide.

I have said what the rule does *not* tell us: neither by itself, nor

by the example. Let us consider a moment what it *does* tell us. IX
It tells us that if words have no sense, we must deviate a little *Interpretation of Laws*
from the sense they have. The same is to be done also when the
sense they have is an absurd one. I presume therefore we must
deviate here a little from the sense of our Author in order to
make anything out of it. This is only to be done however when
the sense is 'either *none*' at all or '*very* absurd': and then we must
'deviate' only 'a little'. Admirably precise for determining the
occasion and quantum of deviation! We are to deviate, we are to
run away somehow or other from the sense, but where we are
to run to, or what is to guide us in | our deviation, is more than 41
he thinks worth his while to tell us. As to the *occasion* when the
literal sense is such as if pursued would carry us away, I should
say to *the end*: as to the *quantum* of the deviation, *so far*, I should
say, as is necessary for the attainment of the end. The end here
is, the suppression of a certain mischief: the mischief of persons
drawing blood from each other in quarrel or in the design to
rob and murder. Now if the man's blood that the surgeon
drew was drawn in quarrel, or in the design to rob or murder,
the Surgeon should be punished as well as anybody else:
because the punishing him would contribute to the end: the
suppression of the mischievous practice of drawing blood with
such design. But if he had no such design, but meant on the
contrary to give the patient relief from his disorder, then he
ought not to be punished: because the punishing of him could
contribute nothing to any such end: on the contrary it would
contribute to two very bad ends, the keeping each man in alarm
for his own condition, as seeing that innocence would be no
security to him against the Law: and the making him afraid to
embrace such opportunities as chance might throw in his way of
being of use to others.

But now we come to the recipe of recipes—'The reason and
spirit of the Law.' This is the grand elixir that restores to life all
Law that wants it: which when it flies out of it leaves it a dead
carcase. For *reason*, as our Author and his brother-adepts are
fond of proclaiming in their moments of enthusiasm, is the life
of the Law.*

| But lastly, the most universal and effectual way of discover- 42
ing the true meaning of a Law, when the words are dubious, is

* I Comm. 70.

IX *Interpretation of Laws* by considering the reason and spirit of it; or the cause which moved the Legislation to enact it. For when this reason ceases, the Law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero or whoever was the author of the Rhetorical treatise ascribed to Herenius. There was a Law that those who in a storm forsook the ship should forfeit all property therein, and the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one rich passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the Law. Now here all the learned agree' (why is it that *learning* is to be made judge?) 'that the sick man is not within the reason of the Law: for the reason of making it was, to give encouragement to such as should venture their lives to save the Vessel: but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed anything in its preservation'.

Under this head, our Author, to do him justice, is tolerably
43 precise and regular: so that a part only | of the questions we mentioned as proper to be annexed with relation to the last head, remains unanswered here. Nothing, it is true, is said to satisfy us concerning the identity of diversity of the import of the words *reason* and *spirit:* nay another word to increase the perplexity joins the company in apposition: the word *cause*. But the plan of the paragraph is beyond custom regular: there is, first the rule, 2dly the example, and lastly the application of the example to the rule. Not that the application of the rule itself is yet brought home to practise, as we shall see presently.

Not that the Law brought for example is such an one as should have the countenance of my citation were I Professor, tho Cicero were unquestionably as he is probably the person who proposed it. The judgment of the pupil in Jurisprudence is shocked if penetrating, or broken into servility if obsequious, by Laws foolish upon the face of them, brought on gravely upon the carpet, without any observation of their folly. Such would be a Law making a present of a ship and cargo, to whoever staid in it in a storm while others left her. A ship soon earned by any crew who could come to an understanding with one another,

and without the risque of Piracy. To interest the crew in the preservation of the vessel is unquestionably a very judicious policy: but it is not thus that our English Law carries it into practise. There is one point it concerns us much to settle, in order to know what use to make of this rule in practise. This is, what it is we are to infer from this agreement | of the learned? 44 what is it that is to be done in consequence? I mean, by a Judge having the Sick man's claim before him to decide upon. Upon the face of the Law standing as represented, how is it to be interpreted? (for the application of the example to the rule, or at least of the rule itself is not yet brought home to practise.) Is the Sick passenger's claim against the Owner (being as the learned are supposed to agree and that rightly, not within the reason of the Law) to be admitted or rejected? Rejected, I suppose, without doubt. For the question is, not how to frame a new Law, but to interpret in practise so as to execute a Law subsisting. Here then we have the maxim laid down without guard or hesitation. When the reason of a Law ceases, the observance and execution of it ought to cease. 'For when the reason ceases' (to use our Author's words) 'the Law itself ought likewise to cease with it.' Whenever the time comes, in every instance if ever that time comes, the Law ought to be made to cease, not by the Legislator, for that is out of doubt (and in this place out of debate), but by those to whom it belongs on their own account, and ultimately by those to whom it belongs authoritatively on the public account to interpret it: that is by force of the interpretation they are to put upon it; and with respect to these last, of the decision they are in consequence to pronounce upon it. This is the work our Author has done by force of this wonder working reason and spirit of the Law. Thus clear is the ground upon which he has placed the standard of decision. | This is the way 45 he takes to put life into the Law. I take one of his own examples.* I am a Judge. The Law has been that a Brother shall not succeed to his Brother of the half-blood. For this regulation there was once, let it be supposed, a reason. Not that I know of any: but be it so for the example's sake. That reason, that of preventing accumulation of property, or any other, has now ceased. The half-brother sues before me for the succession. What am I to do? To give it him, if I may believe our Author. For when

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* I Comm. 71.

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the Reason ceases, the Law itself ought 'likewise to cease with it'. Another, under Statute Law—the first that offers. Corn rises above the usual price. Parliament prohibits the exportation of it for a year. The reason is, the dearness of the price. In 6 months the price sinks to its former level: that reason ceases. I am a Corn factor. I ship my Corn at the 6 months' end; and it is stopped by the King's officers. What is the Judge to do? sustain my action. For when the reason ceases, the Law itself ought likewise to cease with it. . . . Were our Author a dead oracle of the Law, and I a corrupt dispenser of it, I could wish for no better warrant for my enterprizes, as far as opinions could give warrant, than this paragraph.

I take compassion on the unpractised student, thus bewildered and deluded. I will anticipate a little, rather than abandon
46 him for want of such lights | as I can furnish, to the darkness and distraction in which his guide has left him plunged.

A Law is made: it is made to a certain end. The intention is manifest: it is to attain that end. It is improvidently penned: the effect is, that there is a case in which complying literally with its directions would not contribute to the attainment of that end. It is plain therefore that such compliance was not intended to be enforced at the time the Law was making. Exact it not, then, I say to the Judge: and to the citizen, suppose not that it will be exacted. To this case the Law is not to be interpreted to extend. For to this case the will of those who made the Law never did extend. The words of a Legislator are no otherwise to be regarded than inasmuch as they are expressive of his will.

But a change has happened: circumstances are such the compliance with the directions of the Law in *no* cases now answers the intention: are we then to cease to pay and to exact compliance? By no means. For under Statute Law the Legislature itself has declared expressly, by limiting a time, that compliance in all cases in which they mean it should ever be exacted shall continue to be exacted for that time. The expectation of men
47 hath fashioned itself to the extent of that time: and sees not | how to give any other bounds to it than the Legislator himself has given. Change of circumstances may happen: but change of circumstances may be gradual: and may have happened in the eyes of some before it has in the eyes of others. The expectation of some men concerning the enforcement of the Law will not

have followed the opinion concerning such a change in others. It is for them only to alter the course of expectation who first gave it its direction.

The question is concerning the intention (viz. of those who made the Law) at the time of making it: not what at a subsequent time, ought to be or may probably be their intentions. For that these supposed subsequent intentions are not turned contrary must be taken for certain, since they have not changed the expression of them: and to change their intentions to what it is conceived they ought to be, belongs to them only, and to no other person: for that other person who should do so would be himself the Legislator.

An alteration, slight in words, but weighty in effect, in our Author's aphorism, would fit it to the truth. What he has said, is, *When* the reason *ceases* (when, that is, in every instance after a certain *time*) the Law itself ought to cease with it. What he ought to have said, is, 'Where (that is, in those particular instances to which) the reason does not extend, the Law itself ought not to be interpreted to extend'. Always understood, that the end the law has in view, and thereby its intentions concerning the means prescribed, is so clear and manifest, as not to be liable to dispute.

[SECTION X]

BOOK II. SECTION I.

STATUTE LAW. KINDS OF STATUTES

Introduction to this Book.

IT costs us so many words, and that unavoidably, to do justice to our Author's various merits: to comment on his commentaries, to introduce to his Introduction, to explain his explanations and now lastly in particular, to interpret his methods of interpretation, that I fear the Reader will begin to think he has had enough of it. The ensuing Book, however, that is, the ensuing Section of our Author which is the subject of it, will be more rich in matter than the preceding one. We begin now to descend from the craggy region of unintelligibles; and to get footing in the champaign territory of real and ostensible existence. The objects we shall have to bring to view will be more familiar: and in those objects the veteran practitioner, if any should deign to join with us, will begin to recognize his old acquaintances. We shall now have to speak of Statutes such as we have seen and handled: not of Laws merely, such as men sick with false learning have been used to dreaming of.

2 | We now come to our Author's third section: of which the business is to divide the whole body of our English Law into two large branches, the Statute Law, otherwise called the Written Law, and the Common Law, otherwise called the Unwritten. Each of these is then pursued through two or three stages of subdivision: though not so far as to descend any where to particular articles, unless where they are adduced in the way of exemplification to illustrate the character of each class. The Section then concludes with a set of rules, ten in number, to guide us in the construction of Statutes, being the articles of which the Statute Law is composed.

Tis of the Common Law he speaks first, probably as having come first in order of existence. For first in order of existence it certainly did come: tho probably not under any such name as Law: a word which, it should seem could hardly have been called for, till it was wanted to express an idea, that had for its

3 archetype some sensible symbol of the Legislator's | will: at least

a determinate collection of *sounds*, if not of *characters*, the visible X
and permanent symbols of those sounds. Before Statute Laws *Statute*
were written, before any Laws were expressed in writing, in *Law*
short before any Laws, any commands issued for universal and durable obedience were issued, States being notwithstanding formed, the people of them were governed, as it were from hand to mouth by sets of that sort of transient and particular rules of which in great part is composed what is stiled the Common Law. By rules such as these, as far as they went; and where they were deficient, by general unauthoritative rules of conduct framed at hazard, by each individual for himself in his own mind, from a supposed conformity of his case to some one of such particular, authoritative ones as had come under his observation. From the observation of some article in the course of conduct habitually maintained by those in power, in the way of primary command, or in the way of Sanctionary command, in the distribution of their Punishments or their rewards.

| In order of existence therefore the Common Law stands first: 4
but in the order of intellection and instruction, in the order in which it can be best understood and easiest explained now that we have the other, it as certainly comes last. For the nature of the whole together and much more of the particular articles that compose it, can by no other means be so well explained, as by shewing in what respect it approaches to the nature of the whole together and of the several articles of the Statute Law. Indeed, if we come to particulars, there is no possible means of explaining what it is that shall be understood to make up an article of Common Law of a given description, but by imagining some correspondent article of Statute Law that shall represent it. The Common Law is but the Shadow of the Statute Law, although it came before it. Before the appearance of the Statute Law even the word 'Law' could hardly have been mentioned; for what one individual object was there | to which it could be applied? 5
As a system of general rules, the Common Law is a thing merely imaginary: and the particular commands which are all that (in the way of command) there ever was of it that was real, can not every where, indeed can seldom, be produced. Tis the Statute Law then that first suggested the idea we have (when we have any) belonging to the word *Law*. The Statute Law is a body composed of members we are acquainted with. Those members

X *Statute Law* are familiar to us: the idea of each one of them has a fixed and accurate termination in our minds. We see, we hear, we touch; in short, we handle them. The idea of each one and of the whole together is positive: its *archetype*, such or such a Statute, is existing and before us. We see in every instance who made it: when, where, and how they made it: we call for and have produced to us at any time the very thing they made. With the *Common Law* it is, in every particular that has been instanced, different. Once more, to give a gross idea of it, what is the *Common Law*? What, but an assemblage of fictitious regulations feigned after the image
6 of these | real ones that compose the Statute Law?

Our Author, treating it as if an adequate idea of the whole and every part of it were already formed and already become familiar, meaning to declaim upon it (which is easy) and not anywhere to explain it (which is not quite so easy) might speak of it in one place as well as in another. He has accordingly spoken of it in the first place, before the Statute Law, probably for the reason that has been mentioned. For our parts, whose humbler aim it is 'per laborem plurimum' to make both the one and the other if we can intelligible, bound as we are in the main to pursue his footsteps, we must invert that order. This however as what he has said of the one sort of Law is sufficiently distinct from what he has said of the other, is what will not introduce any perplexity in the thread of our discourse.

The first thing our Author does with the Statute Law is to make a sort of analysis of it: which he carries as far down as the
7 names go, that | he has been used to, and there leaves it. The next and last is to lay down a set of rules for the construction of Statutes, being ten in number, the same we gave intimation of in a former Book.

This Analysis, it should seem, was designed for a complete one: to which epithet it has about as good a title, as his explanation of the articles in it has to those of perspicuous or instructive. After referring 'the manner of making' 'Statutes' to a subsequent part of his work; 'At present', continues he, 'we will only take notice of *the* different kinds of Statutes, and of some general rules with regard to their construction'.* *The* different kinds of Statutes . . . as if the *heads* he intends to give us were all that were or could be made out of the stock we have of *individuals*:

* I Comm. 85.

not considering that in kinds of Statutes, as in kinds of anything X
else, there are just as many as a man sees cause to make of them. *Statute*
The kinds of Statutes *I* see cause to make, as it happens are much *Law*
more numerous : | and it would be a pleasant controversy enough, 8
if we were to dispute about it, and to maintain: he, that his list, was *the* true list of them; I, that mine was. In truth, wherever a man perceives distinction between two individual objects, he may make, if he sees occasion for it, two kinds of them. As with the objects of sense, so with those of intellection: the different properties by which they are capable of suggesting different perceptions to us are made indeed by him who made those objects: but the distinctions of nomenclature which serve to announce those differences, and by which the objects are marshalled into kinds, are made by us who look upon them. Tis an observation of Locke's, which our Author would have done well to profit from.

The kinds however he gives us, are as follows. First, they are either General otherwise called Public, or Special otherwise called Private: and there ends that source of division. He | then 9
takes up a new one, which distributes them into Declaratory or Remedial, and these last again into enlarging and restraining: and there it ends. Of all these in their order. But let us hear his words.

'Let us next proceed', says he, 'to the *leges scriptae*, the written laws of the Kingdom, which are Statutes, acts, or *edicts* (not that they are ever called edicts), made by the King's Majesty by and with the consent of the Lords Spiritual and Temporal and Commons in Parliament assembled.'

Why would not our Author write in rhime? The jingle of the words would then have been a warning bell to the young student to guard against deception. The reader not expecting the plain truth of things would neither be disappointed nor misled: the false colouring spread continually over every object touched upon would have had a continual apology: and 'the King's Majesty' and the like amplifications of College-rhetoric | would 10
have stood excused by the necessities of metre. It would not then appear so singular, that the very first proposition he utters on the subject should be a false one: palpably so, as any man may see. He may think it a justification to say, that such is the formal language of the law: and a valid justification it may be

X deemed, by those, but by those alone, whose desire is to hear of
Statute Law things, not as they *are*, but as they are *said* to be. 'The King *makes*' says our Author 'the Lords and Commons *advise*, and give *consent*'. What is the truth? precisely the reverse: as all the world knows, and any man in it would have on such an occasion have intimated, but a lawyer. I hope even any Lawyer almost who took upon him to instruct young beginners but our Author. '*Advice*' there 's none: the King it is, who '*consents*': The Lords and Commons '*make*': the King cannot alter any tittle. But we now touch upon the most sensible fibre of our Author's frame.
11 Tickle it with the idea of the Royal character, | and he is transported as it were out of himself, and caught up, like another St. Paul, into the third heaven. No truth too plain or too important to sacrifice to the master-idol of his adoration: no colours too gorgeous to array it in. Will any one call the King '*immortal*'? our Author will call the King '*immortal*'.* Will any one say the King is everywhere? our Author will hail him omnipresent.† Will any one, or will no one say 'he is all-perfect'? our Author will say and think it ornament; and draw conclusions from it and think it reasoning. Will any one say 'the King is God'? I would not be uncharitable: I do suppose he would find means
12 to say, 'the King is | God.' ‡ [Three pages blank.]

The first proposition our author has advanced upon this subject we see is false: it is extraordinary that in a matter so notorious the very next to it should also contain a falsity: a falsity, not so palpable indeed as the other nor so important, but sufficiently

* I Comm. 240.

† I Comm. 260. He talks of the King's attribute of ubiquity.

‡ 'Kings', said *Laud*, 'are lively images of God, short drawn'. This was going pretty far: but Laud was speechifying.[1] 'I have said', quoth a Jew poet, or at least the translator of the Jew poet, 'ye are Gods'; but, adds he immediately, 'ye shall die like men'... and the Jew poet was writing psalms. In a written premeditated discourse on Law, our Author has outranted, not to say out-blasphemed them all. I forget what Italian Priest it was, that speaking of his holiness, and being more than ordinarily sharp-set after a benefice, resolved not to stand haggling, but set pen to paper boldly, and said at once: 'The Pope is God upon earth,' which is a pretty exact translation of Emanuel. Of all these dealers in incense, I know none worthy to smell at the same nosegay with our Author, but the Italian Priest. The King has but one-third as many crowns as the Pope: and our Author has given him thrice as many attributes as the Pope ever pretended to.

[1] In the Star chamber. See [Mrs.] Macaulay's *History*, ii. 187.

known for such to our Author, had he happened to recollect it. X
'The oldest of *these*' (that is, 'Statutes made by and with the *Statute Law*
advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled'). 'The oldest of *these*' (continues he) 'now extant, and printed in our Statute-Books, is the famous Magna Charta, as confirmed in Parliament 9 Hen. III.' Now it is as certain as any point of history, and stands mentioned by himself, that the Commons had no concern in that transaction: if by Commons he meant, men sitting by election, and acting in the right of others.

'Though doubtless', he adds, 'there were many acts before that time, the records of which are now lost, and the determination of them perhaps at present currently received from the maxims of the Common Law.' *

From the word '*doubtless*', of which the natural effect is to induce doubt, while it professes to exclude it, the student would little think as the case is, that Statutes of a prior date are still extant and published in no small number, purporting upon the face of them to be as much Statutes as the Magna Charta.† These, from the records of them being lost, are left to stand upon the common evidence of History: and it is from that reason probably that they have lost their binding force. Some there are among them for almost every King's reign from the Conquest to that of Hen. 3d with whom commences the authoritative collection: not to mention | Laws of Saxon Sovereigns without number. 16
If it is not from their being not extant, but from their being unauthenticated that all these Laws have lost their force, it would have been worth while to have said so. 'The manner of making these Statutes', proceeds our Author, 'will be better considered hereafter, when we examine the constitution of Parliaments. At present we will only take notice of *the* different kinds of Statutes: and of some general rules with regard to their construction.

First as to *their several kinds*. Statutes are either *general* or *special*, *public* or *private*. A general or public act is an universal rule, that regards the whole community; and of these the courts of Law are bound to take notice judicially and *ex officio*; without the Statute being particularly pleaded or formally set forth by the

* [I Comm. 85.]

† The latest and fullest edition of them is by Wilkins.

X party who claims an advantage under it. Special or Private acts
Statute Law are rather exceptions than rules, being those which operate only upon particular persons, and private concerns; such as the Romans intitled *Senatus decreta*, in contradistinction to the *Senatus-consulta*, which regarded the whole community:* and of these the judges are *not bound* to take notice, unless formally shown and pleaded. Thus to shew the distinction, the Statute 13 Eliz. c. 10 to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act: it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A. B. for sixty years, is an exception to this rule: it concerns only the parties and the bishop's successors; and is therefore a private act.' This is the account our Author gives us of a distinction, as useless if definable, as it is impossible to be defined. That it is impossible to be defined is what at least the occasion called upon him to tell us, instead of professing to 'shew' 'the distinction' by examples brought in to make us imagine that it *was* to be de-
17 fined, and that he had furnished us with the means. | Judges may say, and compilers may say after them, of this Statute, that it is a Public one—of this other that it is a Private one; but it is not that can make two kinds of Statutes: while it is impossible (as it is) to assign any marks whereby it can be ascertained which of the two names belongs to any individual Statute beside those on which they have thought proper already to bestow them. Of what nature then is the distinction between Private and Public among Statutes? precisely of the same as that between short and long, between small and great, between few and many.†

A Public Statute is a Statute that regards every soul in the nation, not a creature to be excepted: according to our Author: 'an *universal* Rule' (for *general* will not satisfy him) 'that regards
18 the whole community.' | A Public Statute is that which concerns many persons in the nation, say the Authorities: a Private Statute is that which concerns one only, or a few.

* Gravin Orig. 1 ss. 24.

† I remember when I was a child, my Nurse's singing to me a ditty, the beginning of which I do not recollect, but the conclusion was:

'A long-tailed pig, and a short-tailed pig, and a pig with a curling tail.'

This, even without the last article of it, was precisely as good a classification of pigs, as our Professor's is of Statutes.

A Statute that concerns all the Clergy (a multitude that may X
19 be counted) is a Public one.* | But a Statute that concerns all *Statute Law*
offenders (a multitude that can not be counted) is a Private one.†

| A Statute concerning Wales has ever been treated as a Public 20
one: but a Statute relating only to one or two counties (one of them for example Yorkshire of itself near as big as Wales) is a Private one. In the Statute 13 and 14 Ch. 2. c. 12, a clause for the erecting of a workhouse in Middlesex, a regulation for employing the poor of Middlesex in Middlesex has been holden to be a Public clause:‡ but a Turnpike Act for Middlesex and other Counties, an Act that lays a tax on travellers from all parts is, it seems, a Private one. For an express clause is constantly inserted in all such Acts to give them the name of Public.

The King (whether God or Man is not absolutely determined) is, however, make the most of him, but one person: yet 'A Statute which concerns the King' (says Bacon or whoever was the compiler of the Article 'Statuti' in the Abridgment that is called Bacon's) 'A Statute which concerns the King is a public one: For every subject has an interest in the King who is the head of the body politic; and consequently ought to be as sen-

* *4 Rep. 76. ib. 120. 2 Roll. Abridgt. in Bac. Abridgt. Tit. Statuti.*

Nothing will serve Gilbert, but he must be giving reasons for it. Practical Lawyers never should give reasons: 'Ita Lex scripta est', is enough for them: they should stick to that. 'What relates to all spiritual persons', says Gilbert, Law of Evidence 47 'is a general Law, inasmuch as the Religion of the Kingdom is the general concernment of the whole Kingdom, as the 21 H. 8, 13 Eliz. c. 10, 18 Eliz. c. 11' all which are about the revenues of the Clergy. This argument of Gilbert's is elliptical. To be compleat it should stand thus: 'The Religion of the Kingdom is the general concernment of the whole Kingdom: the Religion of the Clergy is the Religion of the Kingdom: the Revenues of the Clergy are the Religion of the Clergy'.

What relates to Sheriffs, says the same Gilbert, is a particular Law: for it should seem that the Justice of the kingdom is not the general concernment of the kingdom. No divine, not even our Author himself, could reason more divinely.

Gilbert on this occasion uses promiscuously the words Statute and Act: Public and general: private, special, and particular. At the same time the words 'Statutes, Acts of Parliament, what a Public and what a Private Act: General and Particular Acts' form so many different Titles in his book. Tis under these titles, not to mention others which promise nothing about the matter, that the doctrine in his book concerning this notable distinction is comprehended.

† *Ld. Raym. 390. 12 Mod. 249 in Bac. Abridgt. Tit. Statuti 640.*

‡ Bac. Abridg. IV, 640 from Sid. 209.

X sible as that which affects him, as a member of the natural body
Statute Law is of what the head at any time feels.* Touch upon the King before a Lawyer and you may be sure of rhetoric at any time, if not of sense. 'The Statute' (p. 641) 'made in the time of Henry the sixth', says the same compiler, 'by which all Corporations and Licenses granted by that Prince are declared to be void, was holden to be a private Statute; because as it does not include all corporations it is not general but particular in a generality, or,
21 *to speak with more propriety*, | general in a particularity.'†

This is but a small scantling out of a large heap of propositions that are to be found in the books, all equally satisfactory: and tis with these materials before him that our Author sets out and tells us, that of Statutes there are two kinds: the one Public; the other Private.

I don't know whether it may be worth while to notice a small contradiction there is between what he says here of Statutes, and what he had been saying a few pages before, of Laws.‡ 'A general or Public act (or statute) is an universal rule that regards the whole community' . . . 'Special or Private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns' . . . Still, however, they *are Statutes*; and for the present *Laws*; since an act, a statute is, it seems, a Law.§ This is more than they were a little while ago (p. 44). Then nothing could be a Law but what was 'a rule': nothing 'concerning a particular person': nothing but what was 'universal'. |

22 But to proceed—How impossible soever it may be to know before hand whether a Judge will think proper to call a given Statute a public or a private one, yet when once it has been called by either of those names, the consequences are these. If a Public one, then to use our Author's words,‖ 'the Courts of Law are *bound* to take notice' of it 'judicially and *ex officio*; without the Statute being particularly pleaded, or formally set forth by the party who claims an advantage under it'. If a Private one then, 'the judges are *not bound* to take notice' of it, 'unless' it 'be formally shewn and pleaded.'

* Bac. Abridg. Tit. Stat. p. 640 from 4 Rep. 77, 8 Rep. 28 133. and Hob. 227.

† Plowd. 65. Bro. Parl. pl. 6 4 Rep. 76 Dyer 119.

‡ [I Comm. 85.]

§ P. 85. 'The written laws . . . which are Statutes, Acts, or edicts'.

‖ [I Comm. 86.]

I would not be positive, but I am apt to believe, that he who X
has read this account of the matter and this only, knows just as *Statute*
much about it as if he had read nothing: except that he will be *Law*
apt to go away with a notion which, I hope, for the honour of
the Law, is very far from true. | I mean that judges are *bound* as 23
to the notice they are to take of Public acts alone, and that as to
Private ones, a Judge is at perfect liberty to do as he pleases,
without his proceedings being appealed from, or questioned by
any other. I am persuaded this is not the case: but that to speak
rightly we should say, not that a Judge is *not* bound to take
notice, but that he is *bound not* to take notice. And so speaks
Bacon, (p. 655 and again p. 657) from a multitude of cases.

The plain account of the matter seems to be this. If in a de-
bate *viva voce* at the Bar a Statute happens to be alleged on either
side, the Judges are under the same obligation to take notice of
it if it be a private statute, as if it be a public one. In that sort
of written altercations which in a technical sense are called
pleadings, the necessity of mentioning it has not been made to
depend upon its being a public or a private one. But when, be
it public or private, it is necessary that it be alleged, if a public
one it may be referred to without recital: if a private one, so
much at least as the party would take advantage of, tho' it reach
from London to York, must absolutely be recited. |

A question that I dare say occurs here to most of my readers 24
who are not lawyers is, for what reason in point of utility need
it be recited in one case especially, if it need not in the other.
Such reason, I must confess myself utterly unable to give: how-
ever I can give a legal reason. The Statutes made in one session,
if there are a hundred of them, as there are sometimes more, are
in Law but one. This one when printed makes generally a good
handsome folio: and is divided into so many chapters; which to
vulgar eyes appear, and by vulgar mouths, nay even sometimes
by learned mouths in condescension to vulgar ones, are spoken
of as so many Statutes. |

These chapters it is plain ought not to have any other division: 25
for this might make the book in some respects like other books;
by which it might be in danger of being intelligible. For the
same reason these few divisions that it has, ought not to be taken
notice of: but the statute in the strict legal sense of the word
ought, as the practise is, to be referred to in the lump, by the

X year of the reign in which it is passed. Now there not being
Statute Law much above a hundred of these Volumes (to speak of Public Statutes) and every one of them, as we have seen, concerning every body: every body is supposed to have got them all by heart: than which nothing can be more easy.* This being the case, for the Defendant to tell the Plaintiff the contents of a Law which he the Defendant means to found his title on, is telling him no more than what he knows already: and it is out of mere favour and bounty that the law condescends in some cases to have required a Statute to be referred to in the general manner above mentioned, and to have laid down a system of rules as intelligible as they are necessary, to determine in what cases this must be done, and in what it need not.†

As to Private Statutes, as they do not concern every body, the persons whom they do concern are not supposed to have them by heart: therefore they must be made to read them. Now if a man is to read a Statute, it is infinitely better he should be made to read it upon stamped paper than in print: because a paragraph written in a beautiful Law hand, just two and seventy words in a page, with only here and there a contraction, is so much easier to read than a printed copy; and stands so much better a chance of being exact to the original, than one copy of
26 the same impression does to another. | I will appeal to our Author, whether if all Statutes, Public as well as Private, were to be cast into numbered articles, as for example the Mutiny Act is, and the articles in Ruffhead's Index, and any number, as there was occasion, was to be referred to in pleading, whether Law would not be somewhat the more intelligible and a good deal the less expensive; and in short whether the whole foundations of it would not be subverted.

The truth of the matter is, that it is to clauses only of Statutes that what our Author has said of Statutes, as far as there is anything in it, can properly be applied. Statutes themselves, take them in the lump, are so thoroughly void of anything that bears the semblance of order or method or regularity, as to be incapable of any classification whatsoever. Not even that loose and vague distinction into Public and Private will distinguish them. For Statutes there are called Public that have in them

* 'Private Statutes', says Gilbert. Law of Evid. p. 12.

† See IV Bac. 655-659.

clauses such as on all hands would be allowed to be of a private nature. X

Statute Law

The Kinds of Statutes—enlarging and restraining.

I will suppose for a moment that the epithets 'enlarging and restraining' as applied to Statutes, instead of being vague and unmeaning as they are, have a signification that is determinate. Remedial Statutes then being divided into enlarging and restraining, two things we are to understand of them. 1st that every Statute which is remedial (that is, which is not declaratory) is either an enlarging or a restraining one. 2dly that a Statute that is an enlarging one is not a restraining one and vice versa: that a Statute which restrains does not enlarge, any more than a statute which enlarges does restrain.

How exact in every particular this account is may be seen [incomplete—concludes:]

The truth is there is no Statute whatever that ought to be called an enlarging one, but ought for as good reason to be called a restraining one: for to enlarge the power of one man, there is but one way, and that is, to restrain the conduct of another.

[SECTION XI]

BOOK III, CH. 1. BEGINNING

HITHERTO we have followed our Author step by step: our remarks henceforward will be but scattered. Of all errors, that respect mere matters of fact, that obscure no part of present knowledge, nor generate any false practical conclusions, we shall leave him in peaceable possession. Even the parts which we pass over might afford matter not utterly unprofitable. But on a subject teeming with matters of observation worthy to employ the attention of the active and the busy: we cannot turn aside to satisfy the demands of the curious and idle. Our business is not with antiquities but with Jurisprudence. The past is of no value but by the influence it preserves over the present and the future. Let us accustom ourselves to appreciate and settle the precedency among the objects of our attention. Let us reflect that our first concern is to learn, how the things that are in our power *ought to be*: that the knowledge of what they have been is of no further use, than as by pointing out the causes by the influence of which they have been brought to what they ought to be, in the few articles of ancient date in which they have been what they ought to be, and by which they have failed of being what they ought to be in the many instances in which they have *not* been what they ought to be, they lead us to the knowledge of the means by which they may be brought to what they ought to be in future: that in studying what they ought to be and how to bring them to it, we shall never be out of the most arduous indeed but noblest road our intellect can travel in: that while examining what they have been, there is only this much to be said for us, that possibly we may smooth the approaches of those who mean to travel there.

I would give very little to know the period when Tithes were instituted: I would give more to see the day when they shall be abolished: converted into an equivalent but less burthensome provision, that the hand of exaction may no longer nip improvement in the bud, and that the pastor and his flock may feed in peace.

I would then leave our Author to pour forth his lamentations

at his leisure: in peace might he adore the exploded divinity of the institution, and stigmatize with irreligion those who should cease paying after the Laws shall have ceased demanding them, as he has done those who omitted to begin: fit employment for a pious and enlightened jurist—passionate follower after any standard of right and wrong that will set him free from that odious and profane one of the public good.

XI *Beginning*

[SECTION XII]

CONSTRUCTION OF STATUTES

SUCH are *the kinds* of Statutes according to our Author: to say
2 nothing of an odd kind or two which start | up by accident in other places, and no notice taken of it: though the distinction which gave birth to it is much more explicitly spoke of than these last, and attended with much more important consequences. We shall pick these up frequently as they lie scattered among the rules of construction which we come to next.

'The rules', he says, 'to be observed with regard to the construction of Statutes are principally these which follow.'* He gives us ten of them.

The first of them, it must be confessed, is rather long and multiform for one rule: but to do our Author no more than justice, it is in itself an useful one, and well expressed. It is followed by an example, and that example by a proper application: but good as the rule is in itself, it is spoilt by the example.

As to the rule—'There are three points', he says, 'to be considered in the construction of *all* remedial Statutes': (he might have added, and of declaratory) 'the old Law, the mischief, and the remedy: that is, how the common Law stood at the making of this act; what the mischief was, for which the common Law did not provide; and what remedy the Parliament hath provided to cure this mischief. And it is the business of the Judges so to construe the Act, as to suppress the mischief and advance the remedy'. And (he might have added) of the subject who is to act in consequence to suppose that the act will be upon occasion so construed by the Judges, so that the mischief shall be suppressed, and the remedy advanced. These few more words he might have added to what he says of this rule for the *Con-*
3 *struction* of *Statutes*, | and then it would have contained all that is good for anything in the five rules he gave us for the interpretation of *Laws* in the preceding section.

I have said that the rule is an useful one; I mean as far as it extends, which is half the way it had to go. I have said that it is well expressed: I mean as to every part of it except that in which it intimates that it has gone the whole way, which it does by the

* I Comm. 87.

word '*all*': '*all* remedial statutes'. The employment of Legislator is not quite so sad an one, as it shews itself to our Author: it is much employed indeed about suppressing mischief: but as we have already intimated, it is sometimes employed in procuring benefits. Where was the mischief before the acts for the encouragement of the discovery of the Longitude? That the Longitude was not discovered? This seems rather harsh to say. Benefit is certainly a more palatable word: it were a pity to shut the door against the few occasions we can have to introduce it. But in the forgetfulness, if it is a forgetfulness, our Author is consistent. He had said something we may remember, (because he had found it said before him) of a sort of sanction a Law might have belonging to it called a Reward, after which, by the bye, no more notice is taken of any such Law as has that sanction, than if nothing had been said about the matter. And yet it seems eminently (I will not say exclusively) the nature of Reward to procure Benefits; as of Punishment to suppress mischiefs. But let us hear | the example. It is that of the restraining 4
Statute of the 13 Eliz. before mentioned. XII *Construction of Statutes*

'By the common law ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors: the remedy applied by this Statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty one years. Now in the construction of this Statute it is held, that leases, though for a longer term, if made by a Bishop, are not void during the Bishop's life; or, if made by a Dean with concurrence of his chapter, they are not void during the life of the Dean: for the act was made for the benefit and protection of the successor. The mischief is therefore sufficiently suppressed by vacating them after the death of the grantor; but the leases during their lives, being not within the mischief, are not within the remedy.' This our Author calls *construction*: This I call alteration. The Judges did not like the remedy provided by the Legislature: they therefore put another they liked better in its room. As to construction, nothing was there to construe: for words cannot be plainer to the purpose in question, and against the pretended construction given, than are those of the Legislature: full, even to tautology; and peremptory, | even to 5
impatience. 'All such Laws, says the Act, other than for the

XII *Construction of Statutes*

Term of one and twenty years or three lives (understand of the lessees) shall be utterly void and of none effect, to all intents, *constructions*, and purposes; any Law, custom, or usage to the contrary notwithstanding'. Nay, say the Judges, but all such Leases shall not be void; for it is not *necessary* they should, to answer the purposes of this act. A lease for any term shall be good during the grantor's life: for as to making it void, tho the Legislature did, it is more than the Legislature need have done. Nothing more unexceptionable in the mouth of a Legislator: nothing more unsupportable in that of a Judge. What renders the act of presumption the less excusable is that it had scarce an object, for considering the advanced age which men must be at ere they arrive at those ecclesiastical dignities, the superiority in value of a lease for the incumbent's life and such a lease as the act allows could be in general next to nothing.

Rule 2. The next Rule is, that 'a Statute, which treats of things or persons of an inferior rank, cannot by any general words be extended to those of a superior. So a Statute, treating of "Deans, Prebendaries, Parsons, Vicars, and *others having spiritual promotion*" is held not to extend to Bishops, though they have spiritual pro-
6 motion; Deans being the highest persons | named, and Bishops being of a still higher order'.

This is to say, that if the Legislature will use general words, they (the Judges) will pay no regard to them. When did the Legislature ever tell them, that such words should operate downwards only and not upwards? Or who can be sure of whether an assemblage of articles are put or no in gradation? and who can be sure in such an assemblage of what is superior and what is inferior? Suppose Deans had been omitted, and Prebendaries had been the first word, would Canons have been to stand included or excluded? What is remarkable is that the Statute here made to serve as an example, is the same that stood as an example of the preceding rule; and there our Author speaks of it to extend to Bishops. On our Author himself nothing is here chargeable, except the inconsistency just mentioned: let us lament however the condition of the Law, thus corrupted by the subtilities of its professors. Tis to construction such as this that we owe in great measure those never-ending specifications, under the load of which all legal instruments are overwhelmed.

Rule 3. The third rule is, that 'Penal Statutes must be construed

strictly'. A rule, the application of which has been, and to this hour *is*, the subject of more constant controversy, than perhaps of any in the whole circle of the Law. We may gather a little more light concerning it |[7] as we advance. 'Thus', continues he, 'a Statute 1 Ed. 6 having enacted that those who are convicted of stealing horses should not have the benefit of Clergy, the Judges conceived that this did not extend to him that should steal but one horse, and therefore procured a new act for that purpose in the following year.' This construction I am aware has been cited as an instance of scrupulousness carried to extreme, but I must confess I see not with what justice. Taking the value of the thing stolen for the measure of the guilt of stealing, the guilt of stealing horses is at least double, to that of stealing one horse: and it follows not, that because the Legislature has thought fit to annex a certain degree of punishment to a certain degree of guilt, it therefore should annex the same to half that guilt. Probable it is at the same time that the intention was thus to punish him who should steal a single horse: but in the doubt the safest decision was that which was on the mildest side: and from this no evil consequence could arise when followed by the well-imagined step that was taken by the Judges. 'They procured a new act' (says our Author taking it from Lord Bacon) 'in the following year.' I honour those Judges, and, of all I know of upon record, would cherish this precedent they have set us. | It points out to their successors the true method of 8 giving the public the benefit of their discernment without transgressing the limits of their authority.

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As to the other determination instanced under this head, I know not very well what to make of it: and still less of our Author's account of it. And 'to come nearer our own times', says he, 'by the Statute 14 Geo. 2, c. 6 stealing sheep, or other Cattle, was made felony without benefit of Clergy. But these general words "or other cattle" being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore it was found necessary to make another Statute, 15 Geo. 2, c. 34 extending the former to Bulls, Cows, Oxen, Steers, Bullocks, Heifers, Calves, and Lambs, by name'.

Now as to this, in the first place, no such doctrine could properly have been holden as 'that the act extended to nothing but

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mere sheep'. It was a doctrine the point in debate could not properly have called for: unless the man was prosecuted for stealing all sorts of animals at once to which any one could think of giving the name of *Cattle*. A man |9 steals an ox for instance: he is prosecuted for it upon this act: All then that could be holden upon the occasion, except what was extrajudicial, was that the act did not extend to oxen—it could not be holden that it did not extend to swine or horses. Altho were the former doctrine actually holden: that the latter would upon occasion be holden is an inference that any man naturally would make.

The word *Cattle* is certainly a loose one: and one that one should be concerned to see in a Statute-Book without a definition. But I should much doubt whether upon the mere ground of its *laxity*, of the uncertainty of its comprehending or not comprehending certain species of animals, the Judges would, (I think verily they ought not) have given no effect to it upon a species, concerning its comprehension of which (to take it by itself) there could have been no doubt. Such I take to be the Ox species. I cannot conceive that if the words of the act had stood simply that He that stealeth sheep or other cattle, shall suffer as for Felony without benefit of Clergy, and a man had been indicted upon it for stealing an Ox, the Judges would have holden that it did not intend to Oxen.

But there is a circumstance in this wonderful act our Author
10 has overlooked: and which seems | at least to have been a main ingredient in those considerations which produced the Judgment. The mischief this act was designed to cope with (or rather the particular methods practised in committing it) is minutely stated, although there was no use for it, in the preamble. It was the practise of a gang of malefactors, who used sometimes to
✗ steal the sheep alive but frequently to kill it on the spot for the sake merely of carrying off a particular part of it, the inward fat. In all this history nothing is said of any other kind of cattle. Sheep then were the sole object of the mischief. An inference not unnatural therefore was, that sheep were meant to be the sole object of the remedy. And for the words '*other cattle*' that were to be found in the body of the act, it might be supposed that there were put in out of abundant caution the different names given to animals of the sheep species from the different

circumstances of age and sex. For no caution which shews itself in prolixity and thence often in ambiguity, is improbable, that is conceivable, in the penners of our Laws. XII *Construction of Statutes*

As for this amending Statute our Author speaks of, it looks as if it had been made in a fit of spleen, as the first seems to have been in a fit of absence— and as if, by the catalogue of synonyms which | after all is not compleat (thus different are prolixity and precision) the Legislator was resolved to be too hard for the Judge, as the Judge had been too cunning for him before. 11

What would give me, I must confess, a certain satisfaction is to take both these Statutes (to which might be added our Author's account of the exposition of the first of them) and throw them into the fire: after which some such short sentences as these two might serve to express the sense of them.

To steal, or kill with intent to steal the whole or any part of an Ox or a sheep shall be Felony without benefit of Clergy. Law.

By 'Ox' and 'Sheep' are meant any animal of the respective species: however differenced by age, sex, or other circumstance. Definition.

The number of words in the two sentences proposed here is 46: in the two correspondent sentences in the Statute Book it is 628. The first more than thirteen times that of the second. And now (since something of boldness is necessary to him that would oppose abuses so inveterate) I here throw down my gauntlet: and I challenge any lover of tautology to shew me in the latter anything that can contribute to answer the purpose of it, and that is not in the former.

From this short specimen it may be judged | whether the occasion for most of our Author's rules be founded on the unalterable nature of things, or in remedial abuses: and whether the complaints that now and then are heard of the composition of our Laws are merely clamour. 12

I have thought somewhat on the subject, and scruple not to avow this persuasion: that a decent attention, together with an adherence to the common modes of phraseology and not the technical, might reduce the whole compass of the Statute Law a proportion not very much inferior: of the Common Law in a proportion ten or twenty times as great.

The fourth and next rule is, that 'Statutes against Frauds are to be liberally and beneficially expounded'. As if other Statutes were to be expounded illiberally and unbeneficially. We shall Rule 4.

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see presently what our Author's notion is of liberality of construction. Meantime, in order for us to know what it is we are thus liberally and beneficially to expound, it would not have been amiss had he given us a definition of the word *fraud*. For
13 the meaning, I | believe, is hardly so well settled, but that a definition of it would be of more use to us than this rule. 'This', he goes on, 'may seem in contradiction to the last rule, most Statutes against frauds being in their consequences penal.' He might have made a distinction among frauds. He might have established two kinds of them: and have shewn us which of them is more apt to be made penal than the other. This is what I have attempted. 'But the difference', continues our Author, 'is here to be taken: where the Statute acts upon the offender, and inflicts a penalty, as the Pillory or a fine, it is then to be taken strictly: but when the Statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally.'

To speak the truth, as to this distinction, there is something at the bottom of it: but upon the face of it as expressed in an antithesis so dark, that I much question whether a young student was ever the better for it. Act upon the offender? how can it, but in virtue of his offence? Act upon the offence? how can it without touching the offender? What our Author does not see, I suppose, at least what nobody would see from his shewing, is
14 | that when it acts as he calls it 'upon the offence' by setting aside the fraudulent transaction, it inflicts (in virtue of the constant consequences of such a setting-aside) a penalty, else it would not be worth a rush: and that to construe it liberally *there*, is to construe it liberally where it inflicts a penalty.

The plain account of the matter is this: The Penalty of a Law again (for Laws that operate by a premium can have nothing to do with such a case) is either what may be termed the ordinary one, or an extraordinary. The ordinary, which consists in the obligation to restore or make amends, as also to pay the costs of the suit brought to put it in force. The extraordinary, which consists of some suffering in property or person, over and above the former: or else some greater suffering instead of it. When the inflicting of the latter sort of penalty is the consequence, our Author would have the Statute construed *strictly*: when the former only, liberally and beneficially. Now, what we are to understand by strictness in the one case, and what *liberality* and *bene-*

ficence in the other, is what there is little hopes, I doubt, of understanding from our Author. Let us see what is done towards it by the example.|[15] Upon this footing, continues he, the Statute of 13 Eliz. c. 5 which avoids all gifts of goods etc. made to defraud creditors and *others*, was held to extend by the general words to a gift made to defraud the Queen of a forfeiture. The liberality of this consists in giving a meaning to the word *others*, and in deeming the Queen when she is not a creditor, to be another person. XII *Construction of Statutes*

The 7th Rule is that 'where the Common Law and a Statute differ, the Common Law gives place to the Statute; and an old Statute gives place to a new one'. What is scarce worth mentioning as a matter of instruction, for any danger there is of a person's entertaining a different apprehension, he mentions: which is the rule itself. What might be perhaps in some measure worth mentioning as a matter of satisfaction he says nothing of: and that is the reason of it. That reason has been already given. Not but our Author thinks he gave the reason too; at least, what comes to pretty much the same thing, 'the general principle it stands upon': because he then said the same thing, as he now does over again, in Latin. 'And this', says he, 'upon the general principle laid down in the last section, that 'leges posteriores | priores contrarias abrogant.' Our Author is so well satisfied with any body's notion who lived a long while ago, especially if they talked in Latin, that it will seldom fail to pass with him for a reason: and what ground they had for it, is not worth enquiring about. Rule 7. | 16

Laws then abrogate prior Laws that are contrary: but this he cautiously advertises is to be understood only when they really *are* contrary. 'But this is to be understood, only when the latter Statute is couched in negative terms or by its matter necessarily implies a negative.' This is what I suppose nobody will dispute. But when he comes up to give us an example, and by that example to let us see what he takes to be contrary, I must think some time and again before I agree with him. 'As if', continues he, 'a former act says, that a Juror upon such a trial shall have twenty pounds a year; and a new Statute comes and says, he shall have twenty marks: here the latter Statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification

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sufficient, the former Statute which requires twenty Pounds is at|[17] an end.' The two Statutes he alludes to are, the first of them 15 Hen. 6 c. 5 the other 23 Hen. 8 c. 3. That the latter of these Statutes to take his account of them 'necessarily implies a negative' upon the former, is more I confess than I can conceive. What ought not to pass unnoticed is that a difficulty like this could never have happened but from an unpardonable carelessness and ignorance: for it is plain, I think, that he who penned or who voted the latter, never could have thought anything about the former. The case then stands thus. Suppose no Statutes passed about the matter of qualification, none was needful: but the first Legislators taking the matter into consideration thought it fit to require a qualification, and accordingly appointed £20. What these Legislators then had in contemplation for the first time was to establish a qualification, there being none requisite before.

What the 2d set of Legislators had in contemplation was also to *establish* a qualification, not knowing of any that was requisite before.* It was not to reduce it, for if it had been they never
18 could have gone about in this dark and | indirect manner. But they set about the work (for anything they imagined) precisely in the same situation with the first set, not knowing that anybody had been before hand with them. Now it would have been strange, if two sets of Legislators, going to work without any communication with each other, and both meaning to appoint a qualification, should both have happened to pitch exactly upon the same sum. As it chanced, the sum the last set pitched upon was the smallest. But what is plain is, that neither of these any more than of the first set was it the intention to reduce it: for if it had been, it is not credible but that they would have said so. Now therefore as it was not their intention to reduce it, upon what warrant can a Judge determine as if it had been? They both say that less than the sums they respectively mention shall not be sufficient: but neither does the one more than the other make any greater sum sufficient any otherwise than by saying nothing to the contrary.

* The first Statute must therefore have lain dormant: which is singular considering the interest the parties defendant had to execute it. These were entire Juries over whom the Juries in question were to sit in Judgment in the heavy prosecution of an attaint.

[19] When I see a doctrine established by any express decision, or even by an opinion of any writer whose opinions men are accustomed to take for Law, I am very unwilling to allege the inexpediency or unreasonableness of it as a ground for its being rejected: Tis very rarely therefore that I should think of contending with our Author concerning what is Law. My judgment in such case goes no further than to suggest what if the matter were to be settled anew by competent authority, *ought to be made* Law. But for once, in the case on hand, I believe, the ground of this scruple does not hold. XII *Construction of Statutes*

The warrant vouched by our Author is the mere opinion, not pretended to be founded on any decision, of a Judge and Reporter, whose authority, even when confining himself to the province of reporter, is generally, I believe, deemed but feeble. And there is a case in point or something very like it in a modern reporter of high authority, in favour of my notion. It is in Strange, P. 402. My wonder is how our Author came to have overlooked it. The case in short is this. A preceding Statute confined to Wales, forbids Bail to be required in Wales upon an action commenced in Westminster Hall for a debt under £20. A | subse- 20
quent general Statute, excepting only Scotland, forbids it for a debt under £10. It was holden that this last provision does not supersede the former one, and that £20 is still the least sum that Bail can be required for. No reasoning is given.

Anticlimaxes of this kind, specifications of a less quantity for any purpose after a greater, are so frequent, the method of consolidation is so much neglected, and that of accumulation so generally pursued, that I know not what work our Author's doctrine would make in the Statute Book if universally applied.* 21

'But', continues our Author, 'if both acts be affirmative' (which

* The effect of these ingenious subtilities is that Legislators know not how to act. In the instance of Penalties, they have sometimes thought that the appointment of a lesser supersedes a greater, sometimes that the appointment of a greater supersedes a lesser, sometimes that both may be inflicted one after another on the same offender for the same offence. They have made provision accordingly. Examples of all this may be found under the head of Deer Stealing. The plain and reasonable notion seems to be to give the prosecutor his option. This is the way to give the whole mass of the Law together the maximum of its effect. Tis the mode adopted by 29 Geo. 2, C. 36, ss. 9 with respect to the district to be resorted to in a case there specified for damages: the Parish or the including Hundred.

The best cure for the mischief of these doubts in each particular in-

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I take to be precisely the case with the two last instanced) 'and the substance such, that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former Law an offence be indictable at the Quarter Sessions, and a latter Law makes the same offence indictable at the Assizes; here the jurisdiction of the Sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either; unless the new Statute subjoins express negative words, as, that the offence shall be indictable at the Assizes and not elsewhere'. He must surely possess more than a Lawyer's ingenuity, to whom this last admonition could be of any use. He that would not give heed to a Statute, so speaking, would not give heed to our Author's rule.

Rule 8.

|[22] Our Author's 8th Rule of Construction is, that 'If a Statute, that repeals another, is itself repealed afterwards, the first Statute is hereby revived, with any formal words for that purpose. So when the Statutes of 26 and 35 Hen. 8, declaring the King to be supreme head of the Church, were repealed by a Statute 1 and 2 Ph. and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in Queen Elizabeth's statute, but these acts of King Henry were impliedly and virtually revived.'

Who says this? a Judge sitting in judgment on the question? no, for no such authority is produced, but Lord Coke writing what he calls his Institutes. Weighty authority, as it is deemed, but of itself not absolutely conclusive. I am speaking as to the question, what *is* Law; not as to what it were of advantage to make Law. With respect to this last authorities have nothing to do. To speak strictly indeed, taking it for granted there is no determination either way, it cannot be said that there is *any* Law about the matter. The question is, properly, whether it is reasonable to understand, that is, whether a person taking the nature of the matter in question into consideration, would be apt to
23 understand, | that the result of such a chain of Laws is to revive the first of them. If he would, then a Court of Law ought to pronounce accordingly. Whether it would be of advantage for the Legislature itself to appoint otherwise, is a different question.

I must once more confess myself guilty of a legal heresy. With

stance is consolidation. A general preventive might be administered by a few propositions laid down by the Legislature.

regard to men, if *Secundus* kills *Primus*, it certainly is not *Tertius*, killing *Secundus*, that will bring *Primus* back to life again. I see not why it should be otherwise with respect to Statutes. As I am not in love with miracles without necessity, I see not what reason there is in this case to suppose a resurrection of the dead. I find it difficult to reconcile myself to the notion of a limbus Statutorum, a middle state between existence and non-existence, in which Laws are kept in readiness to be reanimated. Such a notion does better in Virgil* I think than in Lord Coke. To drop allusions—I should take it, | that when a former Statute has been 24
repealed by a clause in a succeeding one, there is an end of it: and that the will of the Legislator will not have had its effect, if it remains a Statute any longer. When the repealing one has destroyed the one that is to be repealed it has done its office: what becomes of it afterwards is out of the question. When men's intention is only to suspend an act, they say so. If we could suppose a clause of appeal to stand absolutely by itself, to be the whole of what a Statute consists of; and then another Statute to come and repeal this: or if among many clauses in a Statute one is a mere repealing clause, and another statute comes and repeals that clause, specially naming or describing it, then indeed the case would be different. Repealing this repealing Statute must *then* indeed be construed to revive the past; not because the natural effect of a destroying Statute is to bring to life again, but because the Legislature awkwardly and circuitously as they would in such case have gone to work, must be supposed to mean to do something: and in this case supposed, there being nothing but the 1st repealing clause for the 2d to work upon, it must mean to work upon that or else mean nothing. When such is the meaning, to say that such a Statute shall be revived, is a way full as short and intelligible as, and more natural than, to say that such a Statute which repealed it shall be repealed. In such case all that can be supposed | to be meant by having re- 25
course to the dead Statute and using this term revival, is to take it as already penned and already in some degree or other known, to save the trouble of a new Bill.

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Thus much as to the matter of *fact*: concerning which I speak

* At pater Anchises, secreto in valle reducta Inclusas animas, superumque ad lumen ituras Lustrabat, studio recolens: Aen. V. [See Aen. VI. ll. 679–81 and 703.]

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without any very strong degree of attachment to the side I see reason to embrace. The Question of Utility, what it were of use that it should be made to be? will admitt I think of reasons more decisive. [blank.] The case of any rule must admit of doubt and therefore I would have it settled by authority that *can* settle it.

In the first place thus much is manifest; that the indirect method of revival can have no advantage over the direct one: it is as easy to say, that such a Statute shall be revived, as that another shall be repealed. And it has these disadvantages. What sort of compositions our Statutes many of them are, is but too visible: how voluminous their contents, how undigested, how multifarious. A hundred long Sections is no unusual number for a Statute to consist of. In such a mass a short clause repealing a
26 former Statute | may easily in a manner lie hid; either the purport of it may not be noticed, or the effect of a repeal of it may not occur. By and by it is thought fit to repeal the whole Statute; or at least some large portion of it in the description of which the clause is included: either the whole Act by its Title, or a part of it by the usual description of 'so much of it as relates to' a certain subject. By this means if our Author's and Lord Coke's doctrine is admitted of, all that the clause in question had to everyone's opinion made an end of is set upon its legs again, and the legislature is surprized, when by the ingenuity of some Lawyer cleverness they discover a set of regulations is set up for Law without their intending any such thing.

This therefore is an inconvenience I am objecting to: the danger of its being followed by effects which never were in contemplation. A man may in the midst of a large variety of enacting clauses repeal a repealing clause without thinking of what it repealed: a man will hardly go to revive a clause or a statute without thinking of what he revives.

Secondly—The method of consolidation has been happily adopted in a few instances and begins to get in use. The Law relating to one subject is gathered out of a number of Statutes in which it lay disposed and reduced into one: the correspondent Statutes or parts of Statutes it is gathered out of are then repealed.
27 | The 9th Rule is, that 'Acts of Parliament derogatory from the power of subsequent Parliaments bind not'. This is the same rule we had before* in other words: at least a rule so nearly the

* See Rule 7.

same with it, that it might with much more propriety have stood in the same sentence with it, than what we saw. 'So', continues our Author, 'the Statute 11 Hen. 7 c. 1 which directs, tha no person for assisting a King *de facto* shall be attainted of Treason by Act of Parliament or otherwise, is held to be good only as to common prosecutions for High Treason; but will not restrain or clog any Parliamentary attainder. Because the Legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth' (not even dead men who have quitted it) 'which the prior Legislature must have been, if its ordinances could bind the present Parliament'. And upon the same principle *Cicero*, in his letters to Atticus,treats with a proper contempt those restraining clauses which endeavour to tie up the hands of succeeding Legislatures. 'When you repeal the Law itself, says he, you at the same time repeal the prohibitory | clause which guards against such repeal.' 28
'Cicero treated' this notion of 'tying up the hands of succeeding legislators, with a contempt' which now that Cicero expresses it, our Author thinks 'a proper' one. And our Author when in an unlucky hour, Cicero out of his head, and zeal glowing in his bosom, he endeavoured to persuade succeeding legislatures that their hands were tied up, was treated by Drs. Priestley and Farneaux with a contempt which many other people thought a proper one. Lord Coke by a zeal of a very different complexion from our Author's, had been plunged still deeper into a similar extravagance. Different men have different favourites. Lord Coke's was Magna Charta: our Author's were the Laws which punish men for worshipping God peaceably according to their consciences. Our Author had conjured up a degree of difficulty to oppose to their removal that would match with the degree of assurance boasted of by our holy mother church, in the service of whose pious resentments he is thus adventurous. His is not absolute impossibility, but what will do just as well: her's is not absolute infallibility, but something that is made to answer the same purpose.

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| The Parliament *may* committ this outrage, just as they *may* 29 enact, as we shall see presently, that a man shall try as well his own causes as those of other persons: but the beginning of religious liberty would be the end of all good faith: The Presbyterians in Scotland would not bear, our Author is certain, to see,

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at least it would be the highest injustice to them to let them see their brethren, the Presbyterians in England relieved from persecution.

Rule 10.

The 10th and last rule he gives us is well worthy to close the catalogue. It is neither more nor less than that 'Acts of Parliament that are impossible to be performed are of no validity'; that is, in other words, what a man can't do, he shan't be made to do. I remember perfectly well an axiom taught me by my nurse, which coming from such high authority, I was then disposed to think indisputable. It is, that Ferdinando can do no more than he can do. Our Author, for once rebellious to the nursery, it should seem is of another mind. His notion is that Ferdinando can, upon being hard pressed, do more than he can do: and for fear of his being made to do it, thinks proper to give this intimation that he ought not. 'And if', continues he, 'there
30 arise out of them collaterally any absurd | consequences, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that Acts of Parliament contrary to reason are void.' I hope such language, senseless in itself, mischievous in the use that may be made of it, is not 'general' in the mouths of Lawyers. At present I recollect not any instance of it. I will not search. Peace be to their manes. When it is not necessary to put men in guard against their errors, I will not rake into the ashes of the dead. 'But if the Parliament', continues he, 'will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the *main* object of a Statute is unreasonable the judges are at liberty to reject it: for that were to set the judicial power above the Legislature, which would be subversive of all government.' I am glad to have got this much out of our Author: tho' reluctant to separate himself from his brethren, scarce venturing to speak out, and half afraid to listen to the plain suggestions of his own reason: and tho to conciliate indulgence for his Schizm, he slinks into a compromise which involves all the absurdities of the tenets he disowns. I think upon the whole he has done enough to make his peace: when he teaches
31 them the most ingenious method of supporting | themselves in an usurped supremacy, and shews them how, to save themselves

from the reproach of disobedience, they may call in fraud to cover it. I think that, having done thus much to reconcile himself to his brethren, he has, after the manner of the unjust Steward, according to the wisdom of their generation, done wisely, and that he has rendered himself worthy to be received into their everlasting habitations. 'But where some collateral matter', he says, 'arises out of the general words and happens to be unreasonable; then the judges are *in decency* to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by *equity*, and only *quoad hoc* to DISREGARD it.' To 'conclude', when it is thought convenient to conclude that the Legislator did not see a thing, not because the truth is so, but out of decency, rather than set your will openly against theirs: to pick and choose, to obey *quoad hoc*, to disobey *quoad illud*, to let this be 'valid'; and make that be 'void', such is the advice our Author gives you if you are a Judge. This is his notion of what is '*decent*': for my part I should talk no more of *decency*, if I taught men to '*disregard*' the Law that governs them, a Statute *quoad* | anything. 32

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I must leave it to the reader whether the conclusion that follows is to be deemed a sufficient remedy against the poison of what we have seen. 'Thus if an act of Parliament gives a man power to try all causes, that arise within his manor of Dale; yet if a cause should arise in which he himself is party, the act is construed not to extend to that: because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the Parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature or no.' Conceive this possible? why not? to some indeed it might be difficult, but I see not what difficulty our author need perceive in it, who set out with telling us what was to be done with acts ordaining what is 'impossible to be performed.'

It will be of use if we can find a clue to the fallacy that runs throughout the paragraph. It lurks in the words 'reason' and 'unreasonable': | and consists in supposing them to stand for 33 something that is fixed and certain, and that all men are agreed about, and that it could be told by certain indications indepen-

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dent of opinion, whether a given course of conduct was reasonable or otherwise. This is not the case. A regulation lies before me. I look at it and pronounce that it is 'unreasonable': what is it that I mean by this? just this much and no more; that my reason, i.e. I myself, applying to it that faculty in me which is called reason, do not approve of it. I go farther. I cry out that it is 'manifestly contrary to common reason'—what mean I here? still no more than that it is what I readily and strongly disapprove of, conceiving at the same time that it will be equally disapproved of by most others. To confess that as against other men's opinion he has no warrant for his own opinion than itself, is what few men indeed will bring themselves to admit so long as they can help it. Nothing is more shocking to man's pride, nor galling to his impatience. Yet this being the case, it were fit it should be understood; and that, use what expressions of positiveness we will, when all comes to all, reasonableness or unreasonableness is nothing but conformity or nonconformity to, at least can be decided by nothing but, opinion. The question here then is whose opinion shall be the standard? that of the Legislature, or that of the Judge? of him whose office is to *make* his Will be Law, or of him whose office is no other than to find out that will and carry it into effect? As to 'common reason', or the reason of the majority of the people who use their reason about the matter,
34 whose reason is it most to be apprehended should | run counter to it? that of many hundred men chosen the greater part of them by the people (I am now speaking of this country) or that of four men, appointed by the Crown.

'If there arise out of them (acts of Parliament) collaterally any absurd consequences, manifestly contradictory to common reason, they are with regard to those collateral consequences, void.' If we strip this rule (with its expositions) of what is dangerous in it, we shall find nothing more than what our Author has been beating about again and again, and particularly what he said or meant to say in the rules of interpretation he gave us in his Section, about 'spirit and reason' and 'effects and consequence'. The examples there given will contribute to satisfy us of this: they are as applicable to this rule, as to those. Was it really the intention of the Legislator that the Surgeon who to recover a man out of a fit drew blood from him in the streets should suffer punishment? consider the end. Consider the mis-

chief to be suppressed. Consider whether his act was of the nature to contribute to that mischief. Was it really the intention of the Legislature that the sick man who could not quit the ship should be rewarded with the property of it? Consider the end of this provision. Consider the benefit proposed to be attained by it. Consider whether the sick man's conduct was of a nature to promote that benefit. Was it really the intention of the Legislature to give the Judge a power to try his own causes? consider the end of the provisions that appointed him. Consider the benefit proposed from his appointment. Consider whether his having the power of trying his own causes were of a nature to promote that benefit. This if there be room to doubt whether the Legislature meant to appoint him or no. If the Legislature has found means to put that out of doubt, all reasoning about the end is out of place.*

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* [Three pages of fragmentary memoranda entitled *Penal and Remedial* seem to indicate an intention to develop the chapter still further.]

[SECTION XIII]

COMMON LAW

WE come now to the subject of the unwritten Law, a subject which difficult as it is to be understood in itself, and still more so from what has been said of it by our Author, our Author has *left*, not rendered pregnant with instruction.

Exordium.

It is almost too much for me to hope to be able to surmount every difficulty in it I have in view: at least within the narrow limits of the present enterprize. At any rate, however, I will deal honestly with the reader: nor seek to screen a difficulty which I cannot solve. Thrice happy, if by any mite of my oblation I can add anything to the treasury of public knowledge. Happy, at any rate, in a subject of this importance, to be the means of its instruction, tho it were by the avowal of my ignorance, of the detection of my errors!

The subject of the two preceding Sections has been the Statute Law. This branch of Law we there suffered to pass with the epithet 'Written': to which that of 'Unwritten' applied to the branch we are now proceeding to consider, stands opposed. We took that epithet as being that which our Author had made it known by. No inconvenience resulted from our adoption of that epithet. It was not indeed characteristic, but it was not false. Though it pointed not out to us instructive truth, it led us not
2 into error. | It might pass as an attribute belonging to the subject, so long as it was not represented as belonging to it exclusively: it has now however that representation given it: an opposite attribute being now given to the whole remainder of that which goes under the general name of Law. Unwritten Law—this is the appellation under which the whole of what remains of Law is included by our Author. I will tell at once what I take to be the essential character of the branch that stands distinguished by this paradoxical and unmeaning epithet: a property which marks a clear line of distinction between this and the branch we have touched upon already.

Everything our Author speaks of by the name of Written Law is characterizable by this description: It is Law that is become such by the express declaration and appointment of the supreme

body. Whatever he speaks of under the appellation of Unwritten Law, is what is become such not by any express declaration and appointment of theirs, but merely by their acquiescence. The first is a product of their own native growth; the latter of their naturalized importation: the first their own indigenous self-formed will, the other their will only no otherwise than by adoption, and that only a tacit one. XIII *Common Law*

| Thus apprized of the real character of the subject we shall 3 neither be startled at nor confounded by the articles into which he has branched it. They here follow in his own words.

* 'The *Lex non scripta*, or Unwritten Law, includes not only *General Customs*, or the Common Law properly so called; but also the *Particular Customs* of certain parts of the Kingdom; and likewise those *Particular Laws*, that are by custom observed only in certain Courts and Jurisdictions.' Unwritten Law—its three branches.

The next paragraph is to explain and justify the appellation: which before explanation is apt to convey a false idea; and by the time he has explained it conveys none at all.

'When I call these parts of our Law *Leges non scripta*, I would not be understood as if all those | Laws were at present merely 4 oral, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, that the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic Druids committed all their Laws as well as learning to memory; and it is said of the primitive Saxons here, as well as their brethren on the Continent, that Leges sola memoria et usu retinebant. But with us at present the monuments and evidences of our legal customs are contained in the records of the several courts of Justice, in books of Reports and judicial decisions, and in the treatises of *learned sages* of the profession, preserved and handed down to us from the times of highest antiquity. However I therefore stile these parts of our Law *Leges non scripta*, because their original institution and authority are not set down in writing as Acts of Parliament are, but they receive their binding power, and the force of Laws | by long immemorial usage, and by their 5 universal reception throughout the kingdom. In like manner as

* I Comm. 63.

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Aulus Gellius defines the Jus non scriptum to be that which is *tacito et illiterato hominum consensu et moribus expressum.*'

From this florid account all the difference I can make out between the Statute Law and the other sort of Law is, that the former has been written as soon as made, and the latter not till some time afterwards—ins. 1.—Whether the essential and characteristic difference between them be not of quite another nature is what I shall leave to be judged of by those who have seen what has been said of the two branches of Law in the preceding chapter. That this the circumstance of being sooner or later committed to writing, makes no difference between them at all, may very soon be made appear. Take what shall be unquestionably an article of Statute Law, an Act of Parliament, for example. Suppose this not written but verbally proposed and verbally passed. For this purpose, in order to avoid supposing a miracle, suppose it in every respect the reverse of our Acts of Parliament: suppose it concise, nervous, clear, void of superfluities: suppose it even in verse. Suppose it from the mouths of the Parliamentary officers taken by the Sheriffs of the several Counties: and by them in their county courts, as was the custom of old, proclaimed and circulated among the people. Let it be kept thus for any length of time in memory without touching: in particular let it be kept longer than from the time of the landing of the Saxons upon the Island to the date of the 1st treatise we have of Common Law. It will then be longer than an article of Common Law before it is committed to paper—ins. 2.—But will it by that means be an Article of Common Law? No. It was plainly an Article of Statute from the first, and this tho never committed to writing at all, it would remain for ever. Why? because from the first, it was an express declaration of the Will of that supreme body whose office it is to make Law, issued by themselves. [New paging]

5 | The remainder of this page and the whole of the three next are taken up with a history of this Unwritten Law, the revolutions it has undergone, and the several written digests that have been made of it: that is, of that branch of it which consists of General Customs or the Common Law properly so called. This history is so much the more edifying as it is plain that in all the time he was writing it he had scarce in his mind the idea of any one article of it in particular to which what he has said of the whole can be applied. This will appear in the next page, where

having forgotten his history of it in general he proceeds to give us by way of specimens, some articles of it in particular. If we should think it of use to pay any attention to this history, what we have to say of it will be better understood, after we have examined those parts of it which he has instanced. | 6 XIII *Common Law*

'As to General Customs', says our Author (p. 68) 'or the Common Law properly so called; this is that Law, by which proceedings in the King's ordinary Courts of Justice are guided and directed.' One of those Laws, I would rather have said: for I suppose the Statute Law is at least occasionally another. 'This', continues he, 'for the most part, settles the course in which lands descend by inheritance; the manner and form of | acquiring and 7 transferring property; the solemnities and obligation of contracts; the rules of expounding Wills, deeds, and Acts of Parliament, the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior Courts of Record, the Chancery, the King's Bench, the Common Pleas, and the Exchequer; . . . that the eldest son alone is heir to his Ancestor . . . that property may be acquired and transferred by writing; that a deed is of no validity unless sealed and delivered; . . . that Wills shall be construed more favourably, and deeds more strictly; . . . that money lent upon bond is recoverable by action of debt; . . . that breaking the public peace is an offence, and punishable by fine and imprisonment; . . . all these are doctrines that are not set down in any written Statute or Ordinance, but depend merely upon immemorial usage, that is, upon Common Law, for their support.'

The articles above specified our Author it should seem has chosen as being among the number of those that are most important and most striking. And in this view the collection he has made is certainly a judicious and instructive one. | The misfor- 8 tune is, that what he has said of the whole immediately before and after these examples, is, with respect to almost every one of them, palpably not true. This we shall see presently: but in the meantime let us confess our having this obligation to him, that tho he has done nothing toward making the nature of it known to us by any explanation he has given, he has in the articles we have seen furnished us with some not ill-selected specimens, by

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the due consideration of which we may be enabled to do it for ourselves.

These are the specimens of which our Author scruples not to assure us, that 'for their support' 'they depend' 'upon' an 'usage' that is 'immemorial'. These are specimens of that collection of 'maxims and customs' which though most probably founded (p. 67) on a code of Laws part framed and part compiled by Alfred, yet lest this should not make them old enough, is, he assures us, as to the articles of it 'the customs and maxims' themselves, that have been 'so collected', 'of higher antiquity than memory or history can reach': of much higher antiquity therefore than Alfred's time. And this we are to understand not only 1st of General customs which are the universal rule of the whole kingdom, and form the Common Law in its stricter and more usual signification: but also 2dly of Particular Customs; which for the most part affect only the inhabitants of particular districts: and 3dly of certain Particular Laws; which by custom are
9 adopted | and used by some particular Courts, of pretty general and extensive jurisdiction. For into these 'three kinds' he tells us, the unwritten or Common Law is properly distinguishable.

As to the above articles given us for specimens we will now consider them in the order in which he has mentioned them. First, as to 'the course in which lands descend by inheritance'. At present they descend to the oldest male in exclusion of all other children. In the Saxon times, if we may believe our Author himself,*they descended to all the children equally, or at least to all the males. As did Socage estates 'frequently' even so late as the reign of Henry the second. Thus 'immemorial' has been the usage on this head.

2dly As to 'the manner and form of acquiring and transferring property'.—This is performed at present by a variety of complicated conveyances, of different tenors according to the different species of property or interests in property to be conveyed by them. Of these conveyances, none that bear any resemblance to those in use in the Saxon times: Of the origin of many if not all of them we know the date. We know it to be in comparison of the Saxon times, very recent. Many of them we know to have taken their use from Statutes; the dates of which we know to a year. Such are those of Lease and Release, Bargain and Sale,

* II Comm. c. 14, p. 215.

Wills of Land. Some from Statutes and judicial determinations XIII
together: of both of which we know pretty well the aera: Such *Common*
are those of Fine and Recovery. No—Our Saxon Ancestors with *Law*
all their misfortunes were not so unfortunate as to have been | 10
tormented with these engines of chicane.

3. When he speaks of the 'obligation' of contracts, he means I believe the obligation of the engagement itself whatever it be, disposition *in praesenti* or promise *de futuro*. When he speaks of the '*solemnities*' of contracts, he means I take it the solemnities attending the execution of the written instrument that is to serve as a memorial of that engagement's having been entered into. If by Contracts he means the four species of personal contracts as he reckons them (Analys. B. II. ch. 21) 1st Sale, or Exchange. 2d. Bailment. 3d. Hiring or borrowing (engagements concerning moveables). 4. Debt. To these contracts no solemnities are required; and as to their having 'obligation', if they had it among our Saxon ancestors; it is no more than they have always had all the world over wherever there has been Law. If by Contracts he means Deeds, as instruments serving in written words to express the substance of a contract as well personal as real, as well concerning things immoveable, and services, as things moveable, and to stand as evidence of its having been entered into, the solemnities attending the execution of such written contracts are mentioned by him under another article. I mean where he gives it as a regulation of Common Law that a Deed is of no validity unless sealed and delivered. As to the obligation of such contracts that will depend upon the different matter they may be composed of: upon the different sorts of acts that may be stipulated for. But that the same contracts that would be valid now were all valid at the time of the Saxons, or that all that were valid then would be valid now, would be rather difficult to shew. The contrary, I take it, would be much more easy. | 11

4. As to the Rules of expounding Wills, what these may be I do not perfectly understand: one such rule, but one only, our Author himself has given us at the end of a list of six rules for expounding deeds.* To this rule no possible objection can be made: it is an excellent one for expounding Wills: and not a whit less excellent for expounding Billet-douxs or Newspapers. It is neither more nor less than to bethink one's self what it was the

* II Comm. c. 23, p. 381.

XIII *Common Law* writer meant: which is precisely I trust the course a man would take who was to sit down to the business without a rule. That the good King Alfred or any of our Saxon legislators, in the simplicity of their ignorance, ever sat down to frame such a rule, is what I see no reason to suppose: it savours much more of the pompous nothingness of half-learned pedants, such as the law swarmed with in the beginning of the last century and close of the preceding. The truth seems to be, that as an original rule, nobody would ever have thought of giving it: nobody would have ever thought of laying down a rule so nugatory. The view in which it comes to be given is that of an exception to another rule: in which character it is far from being nugatory. To the knavery or imbecility, one knows not very well which to impute it to, of the antient Lawyers, we owe it, that this rule is not a nugatory one: that it is necessary in order to warrant that by this particular species of written instrument which ought to be done by all. It is on account of a rule that prevails that Deeds *inter vivos* are *not* to be construed according to the intent that a rule
12 becomes | necessary to tell us that last Wills are. For that there is such a rule as that just mentioned, a rule long and steadily adhered to, is what, notwithstanding the aversion shewn to it by the liberal men of the profession, is unhappily but too true. If I, for example, in making over to you an Estate, mean you should have the power of giving it away from your relations, and upon such terms only you mean to accept it, it is not all the words in the language put together would do the business, without two choice ones by which any man not in the secret of the Law would suppose we meant to *secure* it to your relations. Were I to say I give you such an estate with a power of disposing of it forever, no such power would you have: you would only have the power of disposing of it for your life. To give you the full power, I must say I gave it to you and to your heirs. Now the particular rule concerning the particular instrument of conveyance called a Will grew up it is plain, as an exception, out of this general one concerning instruments of conveyance in general. That the general rule is one which our Saxon ancestors are entitled to the honour of, would not be easy, I believe, to prove. I think it would be easy enough, were it worth while, to prove the contrary.

5. The next Title of Law which our Author gives us as a specimen of that branch which depends upon an usage that is im-

memorial, is that which comprehends the rules observed in the expounding of Deeds—ins. 2.—Rules on this head, which however are much more rules of his own than rules of Common Law, our Author has laid down. Of these, in order to judge of the probability of their having so remote and sublime an origin as he has given them, it will be necessary to take a brief survey. The first of them is in effect that general one which we have just had occasion to mention. The manner in which he mentions it, and the pains he takes to palliate its turpitude are curious and amusing. Obliged to bring it into view, ashamed to paint it in its natural colours, unable to justify it, and resolved not to censure it, he has varnished it over and given it an aspect precisely the reverse of that which is its genuine one. Let us mark his ingenuity. The words of the rule as he gives it us are these: 'That the construction be *favourable*, and *as near* the minds and apparent intents of the parties, as the *rules of law* will admitt.'* Shall we now bow down and truckle to this sophistry? No: never. The truth, that truth the public is so nearly concerned to know shall be told, and plainly told, be our author ever so unwilling. Yes, it is but too true, and this is the way our Author has—ins. 3—given us to understand it, cases there are, where certain 'rules of Law' do *not* 'admitt' a deed 'to be construed according to the minds and apparent intents of the parties'. I speak not of those cases where the disposition itself is such as the Law, for reasons politic or otherwise, has refused to carry into effect. I speak not of those cases where the Law has given no promise of assistance. I speak of those where having made a promise with one breath it violates that promise in another. I speak of those only (an example we have seen already) according to which a disposition in itself acknowledged to be legal is not to be carried into effect for want of certain legal words: words which were it not for that express appointment, which men are never told of, and which a man must be a sorcerer to divine, would appear to carry quite another meaning than what is given them. Yes, I must again repeat it, which men are never told of: for it is not to call it, telling men in general, the burying here and there by accident a few obscure notices in a lay-stall of legal gibberish, which no man rakes into that is not paid. When the danger spreads itself the kingdom over, I will not call it warning for a

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* II Comm. c. 23, p. 379.

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chance lawyer to get up in Westminster Hall and whisper to his fellows 'there are man-traps here'. These are the rules our Author should have given us a list of, had he meant to tell us what should be worth the telling. But that these productions of knavery or pedantic caprice (it is not easy to say which) were invented by the Saxons,—ins. 4—or that they are of any other than comparatively modern origin, is that of which the contrary, were it worth while, might easily enough be made appear. Be this as it may, these are what he should have given us, instead of a collection of shallow and insipid aphorisms, for which no one
13 is the wiser, such as that we are examining. |

2. His next rule is 'that where there is no ambiguity in the words, an exposition contrary to the words is not to be made' as if where there was ambiguity in the words an explanation ought
14 to be made knowingly against | the words, where the apparent meaning is conformable to them, or as if in any case the exposition were to be conformable to the mere words where the apparent meaning is contrary. What the precise meaning of this aphorism may be, I must profess I do not perfectly understand: but at any rate, by the universal aspect that is given it, it seems to clash against the preceding rule: to reconcile them, that rule must be taken as an exception. What I can collect concerning the matter is that there are cases where the apparent intent is to be pursued in preference to the ordinary import. But this I collect not from the rule but from the example, which is, that 'by a grant of a remainder a reversion may well pass, and *a converso*'. Nothing can be more proper, when such appears to be the intention of the grantor: but why the legal meaning of the words remainder and reversion should be less sacred than that of 'heirs', and 'heirs of the body', is what I shall leave to be considered. This rule, it should be understood, whether to command our admiration the more, or for what other reason I know not, is put into Latin: I saw no reason however why it should not make its appearance in plain English along with its fellows.

A 3d rule is, that the construction be made upon the entire deed, and not merely upon disjointed parts of it. A rule that is perfectly unexceptionable, and might be very useful, could it possibly enter into a Judge's head seriously that he might do by a deed as
15 Lord Peter did by the Will, and | after picking it down to words and syllables, put them together again in any sense he pleased.

The 4th Rule is 'that the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party'. I suppose he means that words are to be taken most strongly against him whose undertaking they appear intended to express, whose act they indicate. This is saying something: but before he has done with it, he almost argues himself out of conceit with it, and brings it down in a manner to nothing. What degree of weight it deserves in point of utility, and what it has met with in point of practise, are questions worth discussing, but which cannot without too long a digression be discussed here. XIII *Common Law*

The 5th rule is, that if the words will bear two senses, one agreable to, and another against Law, that sense be preferred which is *most* agreable thereto. Before I can give this rule credit for any very high antiquity I must persuade myself that it is intelligible. For in order to apply it at all, much [more] in order to apply it frequently, it must be understood.

The word *most* seems to intimate that a disposition made by a man of his property a middle state between acceptance and reprobation. I know of no such middle state: In every case, I take it, the Law will either punish the non-compliance with the disposition, or it will not. Again, I take it, that admitting a disposition in one sense of it to be against Law, | there can be no 16
preference, no balancing, in the case. All we learn in this sense from the rule is, that a disposition which the Law allows not, it does not allow. Moreover it is not probable, that a man, be he who he may, means ever to dispose of his property in two different ways at once. Either therefore his meaning in the case supposed, is to make such a disposition as the law disallows, and then there is an end of it; or one which the law allows, and then the disallowance of the other has nothing to do with the affair. The law's disallowing one of the dispositions in question, affords not, in the unavoidable ignorance men are in in general about the matter, any presumption worth attending to, of the other's having been that which was intended. The Rule itself, as usual, is all darkness: but the example may serve to throw a little light upon it. By the example, which I dare say gave birth to the rule, I am disposed vehemently to suspect that it was made for the purpose of justifying a little stroke of legal leger-de-main. 'As if Tenant in Tail lets a lease for life generally, it shall be construed for his own life only, for that stands with the law; and not for the

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life of the lessor, which is beyond his power to grant.' I speak only from |[17] conjecture: but what I am apt to suspect on this occasion is, that the life for which it was the intention to let the premises appeared to be not the lessor's own, but the lessee's. If I might indulge myself in conjecturing so particularly I would even suppose that the lessor's was a young and promising life, the lessee's an old and unpromising one: and on that, or some such account, it might have been the lessor's meaning to dispose of the premises for his the lessee's life, but by no means for his own: that the Judge whoever it was that made the determination in question saw this; but that the pleasure Lawyers have in being cunning or, as they call it, *astute*, suggested to him the expedient of making the lessee a present of his life in them. Were I to have such a case to determine the disposition I should wish to make of the estate is, to the lessee, not for the entire life of the lessor, but for the joint lives of them both: that is, to the lessee for the life of the lessee, because such was the intention of the parties; but determinable by the death of the lessor, if that should first happen, because to his life is his power of disposal limited by the rule of Law. Such, if I thought the nature of my jurisdiction warranted it, would be, in the case supposed, my determination: and from such a determination the rule I should deduce would
18 be, That where the whole | disposition that appears to be intended, cannot, consistently with the rules of Law be carried into effect, as much of it shall be carried into effect as is consistent with those rules; provided (I ought perhaps add) that no disposition be carried into effect that appears not to have been intended.

The 6th and last of the rules our Author gives us is 'that in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected: wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand. 'Which', continues our Author, 'is owing to the different natures of the two instruments; for the first deed, and the last will are always most available in Law. Yet in both cases we should rather attempt to reconcile them.' So far our Author; although by the supposition they are irreconcileable.

When this is the case with two clauses in a Will, the latter, says the law, shall stand, and very rightly. I must confess I can-

not see why it should be otherwise in a deed. A deed is either (I am speaking in point of substance, and not of form) an indenture or a deed Poll, a deed in which both parties concerned stipulate in a promise *de futuro*, or in which one party alone does. If both parties, not to let them change their mind, if they wish it, is rather hard.[19] | If one only, it seems equally hard not to let him change his: considering that before signature and delivery nothing is ever understood to pass; and this signature and delivery the alteration in question is supposed to precede. A hint dropped by our Author may help us to the origin of this error; for as such I cannot help considering it. 'The first Deed' he says, 'and the last will are always most available in Law.' His argument stands thus. There is a reason (and certainly there is a very good reason, though what it is he has not told us) there is a reason says he, why of two repugnant Deeds, the latter should be obligatory in preference to the first: there is the same reason why of two repugnant clauses in one and the same deed the latter should in like manner be preferred. Of this reason our Author thought he had given a sufficient account when he had said that it lay in the different natures of the two instruments: which is saying just nothing. However a very good reason there is as we shall see: and when we see it, we shall see that to two clauses in one and the same deed it does not apply. The reason of giving the sanction of Law to a man's promise is the expectation it raises of some good, some source of pleasure which is to accrue to the promisee from the performance of it: which expectation if disappointed turns into a pain. Now by a promise before it is communicated, no expectation is raised: or to speak more properly, the act of the mind in question | till communicated, is not a promise. Now of the promises or dispositions contained in a will no communication is made till after death. The expectation therefore that may be raised by a prior testamentary disposition, is at the same instant destroyed by a repugnant subsequent one. It is otherwise with a promise or disposition made to take effect during lifetime. The instant it is communicated an expectation is raised, and that expectation if disappointed, turns into a pain of the same sort nearly as that which a man feels when deprived of any valuable which he has been accustomed to treat and look upon as his own. This being the case to give effect to a subsequent contrary disposition would be in every

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case to produce a pain of the sort that has been mentioned; and at the long run, to destroy all that confidence which by the help of law men have learnt to place in one another's engagements. But is it so with respect to two clauses in the same deed? in the same instrument of disposition? by no means. The case is here precisely the same as between two wills. The expectation produced by the 1st clause is no sooner raised, than it is demolished by the 2d.

To this effect seems to be the decision of plain sense, but the vanity of displaying legal *astutia* dictated a different one. For it is but lately, very lately that Lawyers have weaned themselves
21 from the conceit | that the way to make their notions respectable is to fashion them as unlike as possible to those of other men. Lord Coke, the oracle of the Law, and the idol of our Author, Lord Coke, the original manufacturer of many of these rules, Lord Coke was impregnated with it to the very marrow. We shall see it breaking out in him as we advance, in more instances than one.

With respect to the origin of these rules the truth of the matter seems to be, that the cases produced as examples of them, and in the character of determinations or opinions grounded on their authority, are in fact no other than the very sources from whence they have been deduced. By the word 'therefore' prefixed to every example our Author would fain induce us, indeed, to believe the contrary. But the practise of representing a decision as a consequence of the rule it really gave birth to, and of prefacing it by the word 'therefore', is a kind of logical anachronism than which nothing is more frequent with our Author. Such being the antiquity (as well as such the dignity) of these rules for the construction of deeds, we may judge what likelyhood there is that these articles of Common Law (if such they are to be deemed)
22 are what he would have us think the whole of it to be, 'of higher | antiquity than memory or history can reach'.*

6. As to the Rules of expounding Acts of Parliament, those at least which our Author has given us, what there is in them we have already seen. The representation that has been given of their dignity and use may serve to give us an idea of their antiquity.

7. As to the respective remedies of civil injuries. One of these

* I Comm. 67.

may be a sum of money in satisfaction: the same remedy it should seem that is to be had and always has been to be had all the world over for the same grievances: a remedy for which I see no reason for thinking ourselves particularly indebted to our Saxon ancestors. The other is specific restitution: This remedy the caprice or pedantry or knavery or idiotism of the Norman manufacturers of our Common Law has in most cases denied: whether copying or no in this behalf the example of their Saxon predecessors would be not easy perhaps to find out, and would hardly be worth the while. What is worth the while to think of is that we are distressed by the want of it to this hour. XIII *Common Law*

8. The 8th branch of the Common Law specified by our Author is that extensive one which prescribes 'the several species of temporal offences, with the manner and degree of punishment; a branch of Law in which we see not near so much of Alfred or Edgar or Edward the Confessor, as we do of Lewis | or Frederic or Justinian. 23

These offences, it is well known, were in the Saxon times punished almost universally by a fine certain. The Sums varying from one King's reign to another: but the mode continuing the same. The details may be seen in Wilkins's edition of their Laws. What variety there is in our modern list of punishments, and what advantages result from that variety it is not necessary here to specify. Many since the Saxon times have been even introduced and laid aside. Such are mutilation, emasculation, putting out of eyes. Some have been since introduced and are continued: such as branding. Not only punishments have changed for those that have always been offences, for the same reason that all the world over they must have been offences, but new offences in no small number (I am speaking of offences commitable by men as they are men, not as they are of particular occupations) have since that Saxon period been introduced—Forgery, Personation, False pretences, and Threatening by letters, for example.

The remaining examples which our Author gives us are comprized by him under the general description of 'an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires'. This passage serves as an introduction to some more examples. I shall go on with the review of them, adding them to the number of those which we have | reviewed already. 24

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A 9th example then is that branch of Common Law which provides, if he is to be believed, that there shall be 4 superior Courts of Record, the Chancery, the King's Bench, the Common Pleas, and the Exchequer. For the account of the institution of these Courts in times posterior even to those of Henry the second I may refer to our Author himself in another volume.* The Common Pleas in particular, was established as everybody knows, not by Common Law, but by a Statute: by Magna Charta.

A 10th is that which provides 'that the eldest son alone is heir to his Ancestor.' This example is included in the 1st.

The 11th is that which provides 'that property may be acquired and transferred by writing.' This example is included in the 2d.

A 12th is, that which provides 'that a deed is of no validity unless sealed and delivered.' This example is in a manner included under the 3d. Remark, that the Saxons used no seals.†

A 13th is that according to which 'Wills shall be construed more favourably and Deeds more strictly.' These examples are included under the 4th and 5th.

A 14th is, that which provides that money lent upon bond is recoverable by an action of debt. If by this no more is meant than an article which provides in general that money of the lending of which there is written evidence shall be recoverable some how or other, an article to this effect may be of what antiquity our Author pleases. He need not stop at the Saxons, but may derive it if he pleases from the | Egyptians or the Jews. If he means that provision of our Common Law by which money the lending of which is evidenced by the particular instrument called a Bond in contradistinction to a note of hand is recoverable by the particular mode of procedure called an action of Debt in contradistinction to an action of *Indebitatus assumpsit*, I doubt he must stop very far short of Saxon times.

A 15th and last he gives us is, that according to which breaking the public peace is an offence, and punishable by fine and imprisonment. This might be considered as spoken to under the 8th article. Breaking the public peace is one of those loose and metaphorical expressions of which it were to be wished our Law were purged. Striking in public, I suppose he means, or more

* III Comm. c. 4. p. 37 et seq.

† See Hickes Thesaurus; also what our Author himself says II Comm. ch. 20. p. 305.

generally, striking or attempting to strike. Twas by a fine certain that this offence was punished by our Saxon ancestors, and not by a fine discretionary and imprisonment. Thus ends the list of 'doctrines depending upon an usage' that our Author would make us believe is 'immemorial': 'of higher antiquity than memory or history can reach'.* XIII *Common Law*

One thing I will here mention: that all possible justice may be shewn our Author; that all possible light may be thrown upon the subject; and that the pretensions these or any other specimens of the present Common Law can have to the epithet '*immemorial*' may be placed in the fairest point of view. The sense | given the word '*immemorial*' in the foregoing observations is, it 26 may be said, too strict an one. To say that a custom shall not be deemed an *immemorial* one, if any period however remote can be shewn at which it had not as yet commenced, is as much as to say that no custom whatever shall be deemed an *immemorial* one. Some such period by going high enough, may in every instance be found. At the worst, the deluge, if all others fail. Or if a period applicable to the particular country in question be required, to our own in the present case, the aera of the Britons, the period anterior to the first settlement of the Saxons, may always be assigned, as a period prior to the commencement of any custom we can have now. This certainly deserves consideration. Not that all Lawyers, nor in particular our Author, would be content with so limited an antiquity. 'Our antient Lawyers,' he himself informs us, 'and particularly Fortescue, insist with abundance of warmth, that these customs are as old as the primitive Britons, and continue down, through the several mutations of government, unchanged and unadulterated.'† Our Author indeed, willing to shew himself exempt from prejudice, goes so far, because Selden had gone so far before him, as to acknowledge 'that this assertion must be understood with many grains of allowance'. Talking like these his predecessors at random, and without any view of the parts of that whole of which he was pronouncing, he joins with them, not as to the whole indeed of these customs, but still it should seem | as to the greater part; acknow- 27 ledging only that 'by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans,' *many* of the 'customs' of those nations must have been 'incor-

* I Comm. 67. † I Comm. 64.

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porated with those that were before established'.* However some of these customs he allows of as being of a commencement so recent as that of the introduction of the Normans; which at the same time he does not mention as furnishing any objection to their *validity*. In consequence, so long as he continues in this mood, he is not to be understood as meaning to subscribe to the putting of that strict [sense] upon the word 'immemorial' that we have been speaking of. For a Custom (it may be observed in his behalf) to be properly spoken of as 'immemorial' it is sufficient if at the same time, the commencement of it is antient, and the precise time at which it commenced does not appear. In other words it is sufficient if two things can be said of its original: 1st that it is antient: 2dly, that it is obscure. All this may be very well: but to what degree it must be antient, is what still remains to be settled before the word '*immemorial*' can be said to have a meaning.

I said, 'so long as he continues in this mood': which is not long. Even from this plea, such as it is, he has, in the course of 12 pages, debarred himself. In p. 76 he comes to treat of the properties of a custom. Copying still, and still without thinking, he there says that which estopps him from professing to consider any custom as a good one, of which it can be shewn that there
28 was a time, *any* time when 'it did not exist.' | To make a *particular* custom good, the following, he says, is one among a number of 'requisites' that are 'necessary. That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express Act of Parliament'. Why? because 'the Statute itself', he says, 'is a proof of a time when such a custom did not exist.'† It may be observed in his behalf that the customs of which this is said, are '*particular* customs': and that to particular customs therefore the application of it is confined. This is true, but the only reason why it is so seems to be, that particular customs were the only ones he happened at that time to be treating of. Why particular customs and general ones should be on a different footing in this respect no reason is given: nor will anyone I believe who has read what he has said of the immemoriality of General customs‡ see reason to conclude that by anything he has said here of

* I Comm. 64. † I Comm. 77. ‡ I Comm. 67.

particular customs it was his meaning to make any distinction in this respect between them and general ones. The same phrase which he uses to intimate the immemoriality they ought to have, viz: that they ought to be such 'whereof the memory of man runneth not to the contrary', this same phrase which he applies to *particular* customs *here*, he had applied to *general* ones *there*.

[SECTION XIV]

COMMON LAW: DIVISION OF IT INTO CUSTOMS AND MAXIMS

WE are now to attend our Author to a passage in which he assumes a character very new and strange to him: in which after having been so long the tranquil copyist and indiscriminate panegyrist, he takes a sudden turn and becomes all at once the censor of his predecessors. This new character as evil destiny will have it, sits on him but awkwardly. But let us hear his words. 'Some', he tells us, 'have divided the Common Law into two principal grounds or foundations: 1. Established Customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest, and 2. Established rules and maxims; as that the King can do no wrong, that no man shall be bound to accuse himself, and the like.' Thus far our Author. Those who thus divided the Common Law assuredly saw their way through it but dimly. But our Author speaks the word, and all is darkness. 'These', says he, 'I take to be one and the same thing.' The proof he gives of this identity is, his finding means somehow or other to get the words, Custom and Maxim into one and the same sentence. 'For', continues he, 'the authority of these maxims rests entirely upon general reception and usage; and the only method of proving,
2 that this or that maxim is a rule of | the Common Law, is by shewing that it hath been always the custom to observe it.'*

To lighten this darkness some little pains we shall find necessary. Before all things we must ascertain the meaning of the words Custom, Maxim: we must learn to annex clear ideas to those terms. Of neither of them has any tolerable definition ever yet been given. For each of them we must endeavour to find out one, by a comprehensive and diligent observation of the objects to which they have been applied.

The word Custom in Law has a peculiar sense, very different from the common one, and yet not so different as not to be liable to be confounded with it. In the first place, therefore, let us see

* I Comm. 68.

what is that common one. Custom, to speak of the common acceptation of it, is referred either to a single person or to a multitude. It is spoken of as being the custom either of a single person or of a multitude. By Custom, mentioned with reference to a single person, we mean an assemblage of successive acts of that one person among which an uniformity, a similarity is observable, in other words an assemblage of acts of the same kind. It is my custom to go in term time to Westminster Hall. What is my meaning in saying this? That the act* I do in going to Westminster Hall any given day of the term is one of an assemblage of like successive acts of mine similar in this in that they all come under the general description of going in term time to Westminster Hall. Of a custom in this sense of the word one thing we may observe, viz: that the acts of which we suppose it to be made up when we speak of it as subsisting at any given time, are all with reference to that time, *past*: They are not any of them *future*. To say it is my custom that I shall go in term time to Westminster is what could not fail of striking | immediately 3 anyone that should hear it as an expression preposterous and uncouth.

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2. By Custom mentioned with reference to a multitude of persons we understand an assemblage of such acts either simultaneous or successive, or both, of the persons in question, among which an uniformity, a similarity, is observable: in other words an assemblage of acts of an assemblage of persons, either simultaneous or successive or both, of the same kind. It is the custom of Barristers to go in term time to Westminster Hall. What is it I mean when I say thus. I mean the same as if I had said that any given Barrister's going in term time to Westminster Hall is one of an assemblage of acts of the same description performed by one and the same Barrister in succession, or by a multitude of Barristers at once, or rather as the expression stands here, by every one of a multitude of Barristers as well at once as in succession. With respect to a custom in this sense of the word it is

Popular Sense. Common signification of the word Custom applied to the acts of a multitude.

* Instead of 'act' I should in strictness have said 'train of conduct' since it is not *one* act that is sufficient, but a great multitude of successive acts that are necessary to carry me to that distance. I thought it of use to point out the impropriety in order to prevent confusion and guard against objections. I thought proper, nevertheless, to give way to it, rather than by rectifying it give an air of stiffness and obscurity to the discourse.

custom - in popular speech is a habit of repeating same thing or opinion. Ben. says this refers both past. This custom is allegedly custom, until there is added a future obligation to continue it, & punishment for neglect to do so.

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plain that the acts we suppose to be made up are not any of them future, but all past. It would appear a manifest impropriety were I to say, it is a custom that Barristers *shall* go to Westminster Hall in term time. Thus much concerning Custom in its ordinary and popular signification, in which the acts of which it denotes the assemblage are all spontaneous, at least for anything that results from Law to make them otherwise.

4 | The idea which belongs to Custom in the sense in which the word is used in Law, to a *legal custom*, is much more complex. It involves in it, as a necessary constituent part, the idea of Punishment. Tis this last idea that we must carry in mind, if we understand perfectly what we mean when we speak of a custom as being obligatory. A custom becomes in this way obligatory, and in this way only, namely, by men's being liable to punishment for not observing it. Moreover this and this only is the sense in which it can be applied without impropriety to acts supposed to be future. It has been the custom of the Judges to go in term time to Westminster Hall. In saying thus, I have used the word Custom in its ordinary sense. In the same sense I might even say, it is the custom for the Judges to go to Westminster Hall in term time. I now change the expression and say 'It is the custom that the Judges *shall* go to Westminster Hall in Term time'. Here I have used the word Custom in its legal sense. Why? because I have intimated an *obligation* in the assemblage of persons in question in *time future*, such as, (according to the former proposition) they have actually performed in time *past*. And whence comes that obligation? what is it that constitutes it? What, but their being exposed to punishment if they do not maintain that

5 custom? Tis then in virtue of their being exposed to | punishment in the case of their not observing it, that the custom spoken of as being their custom, is in the legal sense of the word, a Custom. In a custom (using the word now in its ordinary sense) in what I call a Custom *in pays*, in a custom I say of itself, it is plain there is nothing to make it *obligatory*: to make it such a custom the announcement of which forms an article of Law. It is not my having gone for twenty terms together to Westminster Hall that *obliges* me to go the twenty-first. It is not twenty Barristers' having gone for twenty terms together that obliges them or any other Barrister to go again. But make it penal for Barristers not to go to Westminster Hall in term time and by that means and

by that means only they will be obliged to go. By that means and by that means only it may become a Custom that Barristers *shall* go to Westminster Hall. [Three pages *inserenda*] XIV *Common Law*

—Ins. 1—To constitute therefore a custom in the legal sense of the word, to constitute what I would call a custom *obligatory*, or a custom *legalized*, two things are necessary. 1st, The Custom *in pays*, the custom itself that is to be legalized: 2dly One act at least of the person or assemblage of persons that are to legalize it: These persons must be persons of the description of those who are in the habit of punishing, that is they must be Judges: persons within that field of jurisdiction within which are the persons whose custom is that which is to be legalized, that is Judges over that district: the persons within that field being in the habit of submitting to such punishment. As to the *legalizing* act, it must be an act either immediately inflicting punishment on some person for departing from the custom, in which case the Judge is himself the Executioner; or what is more common in regular formed societies, an act expressing the will of the Judge that the punishment shall on the non-conforming party for his past act of non-conformity, be, in usual course inflicted: or at least, that it shall be inflicted in case of any act of non-conformity that shall occur in future.

As a custom of any assemblage of persons at large may become a custom *legalized*, a custom *obligatory*, on persons of that description by an act of those who are Judges over such persons; so may a custom among Judges, a custom *in foro*, be legalized by an act of such persons as are Judges over them; and so on through any number of degrees. Between the manner however in which—ins. 2—a custom *in pays* is legalized, and the manner in which a custom *in foro* is legalized there is this difference. To legalize a custom *in pays*, the punishment that is necessary is punishment inflicted or at least threatened of persons of the description of those whose custom it has been. To legalize a custom *in foro*, punishment also, the punishment of somebody is still necessary: but the punishment is not in the 1st instance the punishment of persons of the description of those whose custom it has been, in this case. Of Judges as such the sole occupation in a manner is reducible to the single one of punishing; or at least of doing such acts as usage has made necessary to the determining whether punishment in any case proposed shall be

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administered or no. Accordingly 'tis of no other acts than acts of punishing, or acts done as above mentioned in order to punishment, or forbearance of punishment, that is to acquittal, that the Customs of persons of this description can consist. There being therefore punishment necessarily in the case, it is not to appearance necessary that in order to legalize such a custom as this latter, the persons whose custom it is should be the objects. To legalize such a—ins. 3—custom, it is to appearance sufficient that in case of any instance of non-conformity, the command of the non-conforming Judge be [offset] by an opposite command of a superior judge, taking the same assemblage of persons as the first did, viz. the suitors, for its objects: that is, to use the current phrase, if it be reversed by a Judgment of a superior Court. I say in the first instance; for if the inferior Judge proves refractory, and persists in the enforcing his order, it is plain that ultimately it is his punishment that will be necessary in order to make the custom he would depart from binding on him. I say also to appearance; for at bottom it is unquestionable, that by the prospect of his own punishment only can a man be bound. But in the mind of a Judge subject to feel incessantly the controul of a superior Judge, the ideas of a counter-command by such a superior and the punishment annexed to the non-observance of it are so intimately associated, that the first is understood to have the same effect upon the inferior Judge to make his custom binding on him, as the prospect of a specific punishment has upon the ordinary subject.

6 | We are now prepared, I should hope, to understand pretty clearly what is meant when it is said to be a legal custom, that 'where there are three brothers' (to take the example given us by our Author) 'the eldest brother *shall* be heir to the second, in exclusion of the youngest'. At a certain time there was in this country an assemblage of persons (Judges) in the habit of bestowing punishment as they thought fit: the rest of the nation being with respect to punishment administered by persons of their description, in the habit of submission. At this time there were in a certain place within their jurisdiction, three brothers. The second of the three had a descendible estate, and died. The younger entered on it; the elder laid a claim to it before the judges. The judges upon hearing the cause, punished or threatened to punish the younger if he continued in possession; and by force

of such punishment or such threat *obliged* him to abandon it to the elder. From that time, younger brethren seeing this to be the case, fell into the custom of yielding to their elders: and thus it became a custom that the eldest brother *shall be* heir to the second, in exclusion of the youngest. Now of the idea of customs thus generated is made up the idea of the Common Law. XIV *Common Law*

A Maxim how different from a Custom.

7 Having thus seen what is a custom, let us now see what is a maxim. A Custom is an assemblage of acts. . . . What then is a maxim? Is this too an assemblage of acts? nothing like it? What then? A proposition: A proposition containing the opinion of him who is the author of it concerning what is in some respect or other the state of the Law. This is that, looking at which, and looking at a custom, our Author pronounces them both to be 'one and the same thing'.

The examples our Author has given us of a maxim may very well serve to explain its nature. The King can do no wrong, is one maxim: No man shall be (rather '*is*') bound to accuse himself, is another. Let us examine them in their turns.

Of the first, namely 'The King can do no wrong', the turn of expression is so ambiguous and paradoxical, that we must reduce it to a greater degree of precision than it possesses of itself, before anything can be pronounced concerning it.

It is susceptible of two senses at least, if not of three, besides the literal one; senses widely different from each other.

① As to the literal one, in this sense it is so manifestly not true, nor meant to be so taken, and in this respect the example is an unhappy one. If the word 'can' refer to physical power, the sense is that the King is physically unable to do any act of the sort of any of those acts that are wrong: that is, that are mischievous: for instance, that he cannot set fire to a house, or kill a man. If the word 'can' refers to legal power, then the | sense 8 is, that the King can not do any act that is wrong, without subjecting himself to punishment: in other words, that if he does any such act, he will be punished. Of this sense the very reverse is that which is true and that which is meant to be conveyed.

② The senses that have been meant to be conveyed by it are these. 1st. That any mode of conduct that in any other man be wrong, and to such a degree wrong as that he would be subjected thereby to punishment, will not subject the King to punishment. In this sense the word '*wrong*' is synonymous to *punishable*.

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The King can do no act that is punishable. Even still the expression is inapposite. To reduce it to a literal conformity to the meaning, it must be uttered thus. *No act that the King can* (i.e. is physically able to) *do, is punishable in him.* Or to render it still more unexceptionable—*The King is not punishable for any act that he can do.* Or lastly, to include *forbearances* as well as *positive acts. The King is not punishable for any* MODE OF CONDUCT *he can observe.* However, as the expression '*mode of conduct*' is not so familiar as the term '*act*' I shall in what follows on this subject, confine myself to the latter.

2dly. That any act which is wrong, i.e. punishable by the Laws, and which *can* not (physically speaking) be done by the King without the assistance of some other person, the King is physically disabled from doing at all, in consequence of a legal
9 disability every such other | person is laid under; namely by being subjected to punishment in case of his furnishing such assistance. For instance the King cannot cause a house to be set on fire that is not within his reach, nor kill a man; nor enter into a house that is not his own, nor cause an innocent man to be arrested, nor a wrong judgment to be given: because such as should assist him in any of the above acts, would be punishable just as if they had done them of themselves. In this sense therefore the expression means, that the King can not by his previous command exempt from punishment any man who (certain assignable cases being excepted) should do any act for which that man would otherwise be subjected to punishment. The cases which are to be excepted are the cases where the King has power to command by virtue of his Prerogative. In short, the King has no legal power to, the King can not, protect his assistants in doing wrong, or thus, No man can assist the King in doing wrong.

3dly There is yet a third sense in which the maxim has formerly been understood to be true. This is in brief that nothing is wrong, that is, punishable, either in him, or in any who assist him. Of this more need not be said, since it is now universally exploded.

To bring the three senses together, and express them in such a manner as shall serve to put the contrast there is between them in the clearest light. According to the 1st, No act done by
10 the | King is punishable in him. According to the second, Every wrong act done by his ministers is punishable in his ministers.

According to the third, No act done by the King, or by his ministers, as such, is punishable either in him or in his ministers. Of these senses the very different 1st and 2d are both compatible, and both true. The third is compatible with the 1st, is in direct contradiction with the 2d, and is not true. The first announces the part of the Law that constitutes his security. The 2d that part that sets limits to his power. The 3d puts a negative upon all limits to his power. The exemption announced by the 1st with the restraint announced by the second is what constitutes one of the most characteristic peculiarities of the British Constitution. The restraint is essential to its being. The exemption has ever hitherto been found compatible with its well-being. Taken in its utmost latitude, it might be otherwise. But the difficulty and danger of narrowing it is so striking that it is not probable that any thing but a very severe experience of the mischief, if even that, would produce a remedy.

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despotism exploded

As to the History of these 3 very different maxims thus enclosed in one. The first that was broached was probably that which is here 1st mentioned. If we may judge by the times in which it was broached, and by the hands that broached it, in the early ages of our Jurisprudence, Lawyers were an idolatrous and servile crew. Uninitiated as yet in the notion of a public, they knew no other sense of loyalty, than | devotion to the King. 11 The King acted for himself, the great Barons for themselves, the rest of the nation was nothing. Made and unmade by him, they were no longer suffered than they would busy themselves in rearing the fabric of his power. They drudged, and in the meantime as is natural to men thus employed, were ever on their knees, before the workmanship of their own hands. Thus circumstanced, in what other sense could they have advanced the maxim, than the first. It was well if they stopped there, and did not push on to the third. The substance of the maxim in this 1st sense recommended it to affections corrupted by servility: the quaint and paradoxical turn of the expression recommended it to understandings vitiated with pedantry. The conciseness of it was subservient to remembrance. It was however ambiguous: this was not the only sense the phrase might with decent semblance be made to bear. In preceding reigns perhaps a few scattered individuals, in the reign of James a connected body in the profession, began to patronize the interests of the people.

History of the three senses.

XIV *Common Law* These saw and laid hold of the ambiguity of this important maxim, admitted the first sense, but grafted on it the second. Their opponents in the rage of controversy strove every now and then to fasten on it the third. That third is fallen for ever into the pit of infamy. The two first have taken root and flourish.

Let us now in this example, observe the nature of a maxim, and imagining ourselves in the place of the inventors, observe by
12 what process it was formed. | I live, say, in the 14th or say in the 15th Century. I am a Lawyer. This question is propounded to me. Is the King punishable for any act he does? I set myself to consider. I first consider a priori and in general.—If punished, by what means should he be punished. Who shall appoint the mode and quantity of his punishment? Whose shall be the hand that shall inflict it? Who shall appoint his punishment? The Judges? but it is he who makes them and unmakes them! Shall they offer to punish him? He speaks the word, and they are no longer Judges. The Great Barons? But it is he that gives them license to assemble. Assembling without that license, they are criminals, not Judges. The Representatives of the people? They are nothing. The great body of the people? may be so, and with reason. But when that moves, there is an end of Law. It is not punishment, but hostility.

I next consider the matter a posteriori in point of fact, descending to particulars—Is there any act of those in ordinary men deemed criminal, for which in point of fact the Sovereign has been punished. I take in hand such as I can make for myself the table of offences—I look it over. I begin with Treason. Has there ever a King been punished for Treason? My answer is, it is impossible. For incendiarism? Homicide and so on descending from the highest crimes, as many as I can think of down to
13 simple inversions of property, | and petty misdemeanors. For any one of them all has a King ever been punished. I recollect: and the answer to every one of them is No. In point of fact then there is no such Custom. There is not so much as a single act to go towards making it: and for Statute certainly there is none. Of Law customary punishment and authoritative command are the only sources. From neither of these is punishment derivable to the King. The King therefore is not punishable.

I say nothing to any objection that may be made to the particular conclusion in question thus deduced. I say nothing to

the convention made by John; that on the commission of certain obnoxious acts on his part, certain of the Barons might seize his Castles and his Lands, and in short *gravari eum omnibus modis quibus potuerint*, distress him by every means in their power. I say nothing of the struggles maintained by almost every King to the period in which I have placed myself, with his Barons: of the distresses of Hen. 3d: the murder of Edw. 2d., the humiliation, deposition and murder of Rich. 2d. All these topics of controversy I lay aside: they are nothing to the purpose. My meaning is but to exemplify the manner in which a maxim in general takes its rise. Whether the particular one taken for an example be true or not, is a question foreign to the purpose. XIV *Common Law*

| I come now to our Author's 2d example of a Maxim. No man 14
is bound to accuse himself. Of this, after having been so full upon the other, our account need be but short. To be bound to do a thing is to be liable to punishment for not doing it. The expression is elliptical: to have a full view of it we must fill it up. To accuse one's self is to accuse one's self of something: of having committed something: that something is an offence: an act of the sort of some of those acts for doing of which he that does them is liable to punishment by Law. To accuse one's self of an offence is to confess the having committed it.

The maxim, to judge strictly of it, is far from being universally a true one. Deplorable indeed would be the state of our Jurisprudence if it were. The whole practise of the Courts of Equity forms a vast exception to it. The delinquencies with respect to which it holds good are such only as are punished by punishment of the extraordinary kind. It extends not to such as are guarded against no other than by the ordinary punishment only, such as breaches of contract for example, and invasions of property with pretence of title, such as are punished by restitution, or compensation, together with costs of suit. | Those who are 15
governed by sounds would cry out tyranny and be in agonies at the thoughts of a man's being bound to confess an act for which he would be made to suffer to the amount of five pounds when the payment of that five pounds is called a penalty: at the same time they are perfectly well satisfied at his being made to suffer by the same means to the amount of five thousands when the payment of it goes not by that name. I hear ten thousand mouths open upon me: I forbear: Against the line that is drawn at

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present I give no opinion. All I mean by what I have said is to point men's attention to substance rather than sound, to induce them to satisfy themselves by more than verbal arguments whether the line is drawn at the point it ought to be, and to examine without prejudice into the genuine grounds of it.

Be it more or less true, it will be easy to understand after what has been said with respect to the other maxim, in what manner this also is formed. I take up the table of offences and interrogate myself as before. The answer concerning each is, after the exceptions that have been hinted at, uniformly in the negative. Putting all these particular answers together, the general conclusion resulting from the whole amount of them I express by the maxim in question, '*No man is bound to accuse himself.*'

From the view we have obtained of the nature of a maxim in
16 these two examples, we may I think, | pronounce it to be, A general proposition serving to express some observation made by him that utters it, concerning the conformity of sundry Legislative regulations or Judicial usages in some point of view. As these regulations or usages are more or less numerous the proposition is the more general, the maxim is the more extensive.

Is there any consideration to fix the least extent such a proposition can have consistent with its title to the name of maxim? I know of none. It might be applied without any very striking impropriety to a proposition expressive of a single regulation, of a single legal custom, of a single judicial decision concerning the legality of an act capable of giving birth to the idea of a separate sort of acts—I might without any striking impropriety take one of our Author's examples of a custom and give it as a maxim, that the eldest of three brothers is entitled to succeed to the middle one in preference to the youngest. But on a proposition thus particular and narrow we should not ordinarily be disposed to bestow the name: we should rather call it a rule. Maxim comes from the Latin Maxima. (Proposition understood) maxima is greatest, most extensive, very extensive. A proposition extending over and including many others. The term Rule may it is true be applied to a proposition ever so extensive because there
17 is nothing in the etymology of the word | to narrow the thing signified in point of extent. But there is in the etymology of the other to amplify that other. If therefore we meant to fix a distinction between the import of the two words, to make the im-

port of the one narrow, and of the other extensive, the word maxim could not have the narrowest import of the two. It must have the most extensive: the narrowest therefore must be appropriated to the word Rule. As things stand at present, they seem to be used almost interconvertibly. XIV *Common Law*

In the definition above given of a maxim I have said '*made by him who utters it.*' And who is that? Any one whatsoever. A Judge it may be, it may be any one else. A maxim becomes current or not current, according to the apparent truth and importance of it, or the credit of him who utters it. But who is it makes a Custom? I mean a custom *in pays* that is become a legal one. Anyone? no, but the Judge who first punishes the non-observance of it after it has become a Custom *in pays*. Who is it makes a Custom *in foro*? any one? no, but the Judges only whose acts are those which go to make it up. Hence appears another difference between a Maxim and a Custom. Of Maxims the number is arbitrary and unlimited. Any man has the making them, and every man may make as many as he pleases. For the number of points of resemblance real or imaginary between so copious a collection of rules as those which may be requisite to announce the commands and authoritative usages that constitute | the body of 18
the Law is unlimited and inexhaustible. The number of the commands and usages themselves tho' vast is however limited. Tis only certain persons have the making of them, and only a certain number that actually have been made. The number of different Rules i.e. different as to substance, for modes of expression are infinite, is limited by the number of customs and judicial usages they serve to announce.

I have said Legislative regulations as well as judicial usages. For a conformity between a number of Legislative regulations is as capable of furnishing matter for a maxim, as a conformity between a number of customs or of Judicial usages. The maxim 'No man is bound to accuse himself' is deducible with equal truth from the Statute as from the Common Law.

[SECTION XV]

COMMON LAW: JUDICIAL DECISIONS

WE now come to another opening in our Author's Theory of the Common Law. The Common Law properly so-called consists of Customs or of Maxims which are the same thing. Thus far we have travelled with him already. These are what the Law consists of. We now come to the mention of a somewhat else, being not that which the Law consists of, but that whereby what it consists of is made known. This, it seems, is the assemblage of Judicial decisions. But let us hear his words.

*'But here,' continues he, 'a very natural, and very material question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the Judges in the several courts of Justice. They are the depositary of the Laws; the living oracles, who must decide in case all cases of doubt, and who are bound by an oath to decide according to the Law of the Land. Their knowledge of that Law is derived from experience and study; from the 'viginti annorum lucubrationes', which Fortescue mentions; and from their being long personally accustomed to the judicial decisions of their predecessors. And indeed, these judicial decisions are the principal and most authoritative evidence, that can be given, of the
2 | existence of such a custom as shall form part of the Common Law.'

'How are these Customs or Maxims to be known, and by whom is their validity to be determined?' These two very different questions he makes one, and accordingly gives them both one answer, which is an answer indeed to the last, but none at all or a very equivocal one to the first. To the first indeed, it would not be very easy consistently with what he has been telling us about Customs, to find an answer. By the Judges, he says, in the several Courts of Justice.

How a judicial act legalizing a custom is to be known, is indeed at once a natural question, and a material one. But how a custom itself, is to be known, is a question, which upon the supposition that it is the custom of the people in general, a supposi-

* [I Comm. 69.]

tion he all along desires us to make, seems neither very natural nor very material. How is it to be known? meaning by the people? Why they know it, by the supposition; they even practise it, it is their custom. 'How are the people to know what it is they do themselves?' God knows, unless they know already. His answer however to the next question (and the same is meant to serve, it should seem, for this,) is, 'by the Judges in the several courts of Justice'. Applied | to this question the word '*known*', 3 I take it is put for '*made known*' and '*by*' is put for '*by means of*.' What we are to understand is, not that it is the Judges that are to know these Customs, but that it is they that are to make them known: that is, I suppose, to the people. Applying then the question to Customs themselves, spontaneous customs *in pays*, the question, we see, is nugatory enough. And the answer is like unto it. These customs are to be made known to the people, who know them already, by the Judges, who unless in virtue of their being part of the people, do not know them. Applying it to judicial acts such as may have served to legalize such customs, thus applied indeed the question is very natural and very material: but a question to which it is a very lame answer that can be given. How are these acts to be made known to the people by the Judges whose acts they are? How are they, or how ought they to be? I will answer both these questions. They are made known thus. The Judge in a narrow, ill-contrived room, where a hundred perhaps can see, where fifty perhaps can hear, where twenty perhaps can bestow themselves at such ease as to profit from their hearing, announces these judicial acts viva voce: Of these twenty, if any one publish what is announced, he is to be punished: so saith the Law.* Thus it is that the acts of Judges are made | known by them to 8 millions of people.† 4

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How ought they? At least by being printed and published by the authority of the Judges. But of this we shall see more hereafter.

* See Sr. J. Burrow's Preface to his Reports.

† So says that illustrious criminal, whose history of the transactions of the King's Bench does so much honour to himself and to those Judges whom he has treated with *contempt*. This if it be a mistake, is not his mistake alone. I am one of a hundred, who have heard and that more than once or I am most mistaken, the same declaration in full and open court from the mouth of the Chief Judge. By what preposterous constitution of things is it, that a proposition so paradoxical and to appearance contradictory, should yet be true?

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The next question to which the answer applies is 'by whom is their validity to be determined? Here to make anything like sense of the answer, we must change the subject of the question, we must lay aside judicial acts, and suppose it to apply to Customs *in pays* proposed to be legalized: and then but not otherwise the answer is intelligible and proper, 'by' (not now 'by means of' but *by*) the Judges in the several Courts of Justice. It
5 is plain that at this time he considers | what he terms the Common Law properly so called, as being composed wholly of these Customs: that the judicial acts serving to legalize these customs he makes something else of, as we shall see presently: and single judicial acts serving to legalize single acts *in pays*, that is to say that matter which has much the largest share in the composition are wholly out of view with him.

The succeeding flourish, not being designed but as an open piece of harmless rhetoric, shall have a passport: but the tail of it, tho it pass without censure, should not pass altogether without notice. One of the sources from whence the Judges derive their knowledge is that of their 'having been long accustomed to the judicial decisions of their predecessors.' This we may observe is no other than that of their having long had a possibility of attaining that information, the attainment of which ought to be made easy to the whole people: their having been long in possession of a share of a monopoly, purchased at the expence of their own unnecessary drudgery, of justice, and of the people's happiness.

We are now come to the character and function our Author assigns to Judicial Decisions.* 'These judicial decisions', continues he, 'are the principal and most authoritative *evidence*, that can be given, of the existence of such a custom as shall form a part of the Common Law.' Evidence? then are they not them-
6 selves a part of the Common Law, but | evidences of something else that is: evidences of so many customs. Good, but when there is no custom in the case, what are they then? Either they are themselves among the ingredients of this same Common Law, it should seem, or they are nothing. But to have said thus would not have answer'd the design: a design scarce recognized perhaps by our Author: but not the less likely to have governed him. The Common Law, in order to make it the fitter for adora-

* I Comm. 69.

tion, was to be turned into an abstruse and invisible quiddity, XV
and which like certain Tyrants of the earth, was never to shew *Common*
itself in public: like them it was to make its existence perceiv- *Law*
able only by means of its delegates: these judicial decisions, which whenever the Common Law was asked for were to be produced *coram populo*, as the ostensible images of its person, not as themselves being that thing, but as *evidence* of there being such a thing somewhere. Thus, to use our Author's own apposite similitude, the Oracles were not the words of the Pythia that spake them, but her words were the evidence of an *Apollo* whose oracles they were.

As to these judicial decisions, with their appurtenances, we are next told, what becomes of them. The judgment itself, continues our Author, and all the proceedings previous thereto are carefully register'd and preserved, under the name of records, in public repositories set apart for that particular purpose; and to them frequent (he might more truly have said *rare and casual*) recourse | is had, when any critical question arises, in the deter- 7
mination of which former precedents may give light or assistance. He might have added for the instruction of the student, what is most true, that what such a record contains is nine-tenths of it notorious falsehood, and not a syllable of reason: a great deal of what was never said upon the occasion, and not a syllable of what was.

And therefore, continues our Author, even so early as the conquest, we find the 'praeteritorum memoria eventorum' reckoned up as one of the chief qualifications of those, who were held to be 'legibus patriae optime instituti'. And so it is, (he might have added) now: but a very different '*memory*' from any those records can give: magazines of lies, and engines of confusion.

Our Author now proceeds to let us understand how it is that Judges govern themselves in making these decisions. In touching upon which important subject, not being able (as indeed who is able) to see clear, he plays off to the best advantage every hereditary art to prevent us from finding out his blindness. 'For it is an established rule', continues he,* 'to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also (for another reason

* [I Comm. 69.]

XV *Common Law* which is the same again in other words) because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a | [8] permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment (No? not according to his own private judgment?) but according to the known laws and customs of the land: not delegated to pronounce a new law, but to maintain and expound the old one. ['] Not according to his own private judgment, but according to the known laws and customs of the land. . . . What our Author means to say by this, I take it, is, that a Judge is to determine according to what is his private judgment, not concerning what would be expedient were there no prior decisions relative to the matter, but concerning what is expedient now that such and such decisions have gone before, taking into the account of expediency, the uncertainty that would result from the departing from those decisions, and the mischief the inexpedience that would result from that uncertainty.

'Not to pronounce a new Law, but to maintain and expound the old one.' He would have spoken more exactly, I take it, and instructively, had he said, to pronounce a decision which must indeed be new, but which there is very cogent reason why it ought to be upon the pattern of the old.

To this rule, however, he tells us there is an exception: which exception he would have us suppose he has described in such
9 manner that we may know it when it occurs. | Yet this rule, he says, admits of exception, where the former determination is most evidently contrary to reason; much more if it be [clearly] contrary to the divine law. Now what is to be evidently contrary to reason? when is it that a determination is most evidently contrary to reason? Let others answer as they please; for my part I will speak plainly, and confess that with me to be most evidently contrary to reason, is to be most evidently contrary to my reason, i.e. to what I like. Perhaps I might go farther and add, apprehending it at the same time to be contrary to what would be liked by others, being in a situation to be apprized of the circumstances that are in the case. But the most prompt and perhaps the most usual translation of the phrase 'contrary to reason', is 'contrary to what I like'. This then is the rule which

our Author has found to give a Judge to whom a preceding determination is proposed. 'Follow it, says he, unless it is most evidently contrary to what you like.' And is this the only general rule that can be given? I much fear it is; at least no better has ever been given yet. XV *Common Law*

Our Author may perhaps demur to this, and say we have done him an injustice. If so, I will beg him to consider his rule a little further and think what more precise construction he can possibly put upon it. The prior determination is to be most evidently contrary to reason. To whose reason? To everybody's? No, that can not be. For to the | reason of those Judges who pro- 10
nounced it, it was most evidently conformable. Whose reason then can he mean to propose for the standard of conformity? In truth it must be the reason, of you, of me, of any one before whom the determination is supposed to be proposed to judge of. It is easy to say, but very fruitless, not so, but the general reason of mankind. Good, but how am I to come at this general reason, in a case too that not above twenty people ever thought of? I cannot go round the world and count suffrages. I must guess at it by my own. Unhappy necessity! which never could occur, where there is a written text, the acknowledged work of a sovereign legislator.

Our Author would have said something, if he had supposed a case that happens not unfrequently, and then told us what is to be done. He would have said something if he had supposed that the preceding determination in question was itself contrary to another still preceding, and have told us what was to be done then. Now this is a case that, unfortunately for the people, happens or at least has happened not unfrequently, not so often because different Judges have drawn opposite conclusions from the same data, as because the data that one Judge has had before him to another have been unknown. For so it is, that among the unnumbered materials that lie buried in the dark Chaos of Common Law, some start up at one time, others at another, as chance or industry intervenes to bring them to light. I give no examples, because I speak what is notorious. In this case the Judge is under little | difficulty: the same sort of reason there is for adhering to the 11
last determination, there is also for departing from it. These equal opposite reasons leave the scale *in equilibrio*. He is at liberty to resort to the dictates of original utility for arguments to turn it.

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Had our Author again instead of reason said utility, he would have said something. He would have referred us for a foundation for our judgment, to something distinct from that judgment itself. He would have referred us to calculation founded upon matter of fact: future contingent utility founded upon past utility experienced. How have stood the stocks of Pain and Pleasure upon such a disposition of things as the determination in question is calculated to bring on? This is the question, stated indeed in the most general and comprehensive terms, which a Judge ought to put to him upon the occasion of every fresh case. The answer it cannot be expected should be given here. To give the answer would be at once to delineate the whole scheme of what ought to be the Common Law. Let it suffice just to hint, that the answer ought to be the summing up the several pains and pleasures that are certain or probable to happen upon each side of the alternative that is proposed.

But hist! another exception yet our author has given us, in which a precedent determination is not to be adher'd to: and that is if it be contrary to the divine Law. '*Much more*', says our
12 Author | with vehemence,* 'if it be contrary to the Divine Law.' Statutes, the known, the ample, the sovereign Laws of the land having long ago been laid sprawling by our author under his feet by the wind of the divine Law, these slender existences, expressions of the wills of particular and subordinate Judges can hardly expect better quarter. As to the Divine Law, what it has to do in this place, or what sort of honour is likely to accrue to it by being placed thus in contradistinction, clear and manifest contradistinction to reason, let others say. Thus much let it be observed, that if it is difficult, as it may be, to say what is the human Common Law, it is a thousand times more difficult to say what is the Divine Law. So that if it be but too easy for a man to find an inlet for his own caprice under shelter of the first-mentioned exception, it is a thousand times more easy under shelter of this last. Farewell Law and Common sense: Welcome, Fanaticism: if this exception be admitted, as a distinct one from the other. We must always remember that out of the whole of what has been called the Divine Law, our Author makes no exception. It is all brought up to set in array against the Law of the Land; Mosaic Law and all. In this humour, in these senti-

* [I Comm. 70.]

ments were the deluded people of the Massachusetts: and in these sentiments they tainted the air with the pestilence of murdering perjury, and the land with innocent blood.* | [13]

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The next thing our Author does is to teach a Judge that is self-willed, by what sophistry he may varnish over his presumption. 'But even in such cases', continues he, 'the subsequent judges do not pretend to make a new law, but only to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined'—ins. 1.—By this the Judge is given to understand, that his business is to look not to his proceedings themselves, but to the name he gives them. If he meets with a decision he does not like, so, it is well, he may overthrow it at his pleasure. Only let him be sure he does not say it was bad law: let him call it no law, and everything is as it should be. This sort of discourse which our Author would have us understand is constantly employed upon such occasions, he is very desirous we should look upon as a masterpiece of policy, as upright as it is refined.†

And it is this miserable sophistry that is to sanctify all that doting pedants have drivelled out upon it in the way of panegyric. 'And hence' . . . yes 'hence' . . . 'it is', continues he, 'that our

* They professed to mould their Law in all things according to the Law of Moses. Moses is severe against Witchcraft. Now this he would not have been if Witchcraft had not been common. Besides there is abundance more about Witchcraft in the Bible. Now Witchcraft having been common then, why should it not be common now? Being satisfied of there being such a thing it was an easy matter to find instances of it. Our Author is a believer too in Witchcraft. See vol. IV. Who could choose but be so, when Addison was so and Hale?

† This policy seems to be the same kind as that which, if modern history saith true, was observed by a certain Jew. This Jew happen'd by misfortune to have a Christian relish for Westphalia Hams: at the same time that he was a devout observer of the Law. To reconcile his conscience with his palate, he took a method with those Hams. He called them stock-fish; and with the said stock-fish (retaining always his aversion for the flesh of swine) did he fill his belly. Upon the same principle it is that many a good Mussulman, who abhors the very name of wine, finds means to amuse himself with *brown water*. This in short is what in vulgar phrase goes by the name of 'cheating of the Devil'.

XV *Common Law* Lawyers are with justice so copious in their encomiums on the Common Law; | [14] that they tell us that the Law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law.'* This latter proposition is easily made good when one knows the key of the conundrum. The trick is, when you are satisfied a thing is not Law, say it is not reason.

'Not', continues our Author, 'that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason,' says our Author, 'and then (by a charitable and unnecessary presumption) the law (that is any chance lawyer who is weak enough to talk so) will presume
15 it to be well founded.' Of this more in a few moments. | 'And', concludes our Author for the present, 'it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been *wantonly* † broken in upon by *statutes* or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniencies that have followed the innovation.'

Thus much to serve for an irrefragable plea for obstinacy: and to confirm that malady which in weak minds and cold bosoms the accumulated influence of interest, and envy and timidity, and ignorance is but too apt to propagate, a malady for which

* These sage aphorisms stand number'd among the maxims of the Law: they were wont to be made frequent use of by technical writers, when the business was to stop the importunate temerity of inquiry, and hide the absurdity of some legal doctrine from the eyes of admiring pupils, or possibly from their own. At this day perhaps there is not a Lawyer of 20 years standing in England, besides our Author whose stomach would not have nauseated such solemn nonsense. Another of the like livery which our Author should not have parted from that company is, that reason is the life of the law. From this added to one of the forementioned ones, results a definition of the Law, by which we may learn that it is a sort of a thing which is the perfection of its own life.

† That '*wanton*' proceedings in matter of Law are apt to be productive of 'inconvenience', is what there needed not a Professor from Oxford to have told us. But this word wantonly seems to have been put in for a sort of scapegoat of our Author's. Having said as much as the sentence amounts to without it, he seems to have been afraid of what he had said: and to have put in this word, in order to be able in case of being hard pushed, to reduce the something he before had said into nothing.

no certain name has yet been found by our pathologists, but which might perhaps be termed, the hydrophobia of innovation. XV *Common Law*

The curious circumstance in the passage, and that which justifies this censure is that Statutes are in this respect put upon a footing with resolutions, as if it had the same effect whether a doctrine of Law were overthrown by a new resolution, the will of a Judge or by a Statute, the will of an acknowledged Legislator. 'The doctrine of the law then', continues our Author, 'is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to—ins. 2, No. 2—former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath, and the law. For herein there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the feudal law, may not be quite obvious to everybody. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the Law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the Law.' *

'Though the reason' . . . 'of precedents and rules' . . . 'be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration.' So far our Author. For my part, I know not that we owe any such deference to former times. I know not that | we owe any 16 deference to former times that we owe not to our own. I know not that we owe them any such deference as to suppose a reason

* I Comm. 70, 71.

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for what they did, when none is visible. Sure I am that it is unnecessary to have recourse to any such defence to justify the adherence to this rule. Whether it never had a reason, or whether having once had a reason, that reason is now ceased makes no difference with respect to the reason we now have for adhering to it. This reason, which may be expressed by one word, stability, our Author had already given us but the page before, tho now as if it never made any impression on him, or so weak an one as to have been obliterated already, abandoned, as it seems, for these false and trivial ones. We need say no more about it here, having had occasion to display the nature and importance of it in the preceding chapter.

17 But let us proceed to the example. I rejoice | always when I get hold of an example. By examples we are enabled to feel our way, when the rules our Author gives us, and every thing he says on the occasion of them elude our grasp. 'It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the King, or other superior Lord. Now this', says he, 'is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions.' This account of the matter, it will not be necessary, after what has been said already, to combat inch by inch. I shall content myself with altering the proposition in the manner in which I should have expressed it. 'Now this, I should have said, is a general rule of Common Law, the terms of which are mine who give it, but the import such as has been deduced by all Lawyers from the observance of a custom *in pays*, not originally spontaneous, produced originally as it should seem by the force of some judicial decision, tho the memory of that decision has been lost: enforced and kept up perhaps by a correspondent custom *in foro*, by a habit in Judges of deciding whenever the same point in question came before them, of deciding as if there had been a positive Statute Law to that effect.' Or to speak more briefly, and at the same time contrast my description the more strongly with our Author's. This
18 is a | positive rule of Law, fixed and established by some judicial decision, which decision is evidenced by custom. To this rule, the dislike our Author has, if any, is not it should seem a vehement one: otherwise he does as much as hint to us, he knows a way of getting rid of it. He would say it was 'repugnant to

natural Justice': and then he might do with it as he liked. What else our Author can mean by 'repugnant to Natural Justice' I know not. For my part I am intimately persuaded of the repugnance of it to utility: and not a whit shaken in my persuasion of the necessity of adhering to it; that is so far as not to run counter to it by any judicial determination. As to the 'artificial reason for it, drawn from the feudal Law', I can readily suppose it 'not to be quite obvious to every body'. It is not quite obvious to me. At the same time, were I a Judge, I should certainly be that modern judge who would wish it had been otherwise, persuaded at the same time, that 'to alter it' was not in my power. Not that this wish would be owing in any degree to the want of the artificial reason's being obvious to me. Whatever it is, it is drawn we are to understand from the feudal Law: and as there is an end long ago, an end of the feudal law, there is an end also of the reason. As little should I 'scruple', 'were any Court now to determine, that an elder brother of the half blood might | enter 19 upon and seize any lands that were purchased by his younger brother', as little should I 'scruple to declare that such prior determination was unjust, was unreasonable',—I might also very likely declare that it 'was *not law*'; because the phrase though affected, and not precisely just, is a common one. But as little, I must confess should I scruple to declare that it was *bad law*; however treasonable it might sound in the ears of such lawyers as our author: because it would be what I meant. That it *ought not*, in my opinion, to be law, I should say boldly: but that it is not law, is what I could not say without being conscious of an impropriety. It is supposed to be determination of a court competent to determine: that being the case, so long as this determination remains uncancelled by a superior court it must be law, if by law here be meant obligatory. During this period let any one take upon him to molest the elder brother in entering upon the lands and he will find himself exposed to punishment, as much as if it were the best law in the world. 'So that the Law', our Author however concludes,* 'and the opinion of the Judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the Law.' Always convertible indeed; as far as the opinion of the Judge carries with it his will: and so long as that will stand un-

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* [I Comm. 71.]

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controuled by the will of a superior Judge: and not a moment longer. 'Since it may sometimes |[20] happen that the judge may *mistake* the law.' That he should mistake his own opinion, his own will, in short that he should not know his own mind, will not often happen.—But here we must change the meaning of the word Law. Law here means not what is law now in the case in question; but what has been Law before in cases supposed to be similar to it. This indeed is what the Judge may easily enough mistake. He may mistake what have been the preceding determinations; nothing is easier when so little, or rather no care at all is taken to let him know them. This is in good measure a matter of fact. Or, knowing all such, he may mistake in the application he makes of them to the case in hand: this is a matter of judgment. In either of these cases he may be said in one sense to mistake the law.

'Upon the whole however', concludes our Author, still in the mind of reducing judicial decisions which are something into nothing, and of turning a nothing into a something, 'upon the whole however', concludes he, 'we may take it as a general rule, that the decisions of courts of Justice are the *evidence* of what is common Law: in the same manner as in the Civil Law, what the Emperor had once determined was to serve as a guide for the future.'

—ins. 3—All this it is true is but an affair of words: but it is our Author who has given words a consequence which it is proper to shew does not belong to them. To men of experience and discernment it may be superfluous but to men in the infancy of their studies it is of use to be fortified against the fascinations of tinsel rhetoric, and to stand apprized of the improprieties of the current language, even while custom obliges them to adopt it.* †

* [The following are memoranda apparently intended for further development:]

No. 4

Why contradictory Statutes do not do the mischief of contradictory decisions. Decisions retrospective.

No. 5.

Mischief of the rule excluding the half blood. Greater mischief of a new decision overthrowing it. Utility of a Statute.

† [The following passage, headed Common Law, seems to belong with this chapter, though not paged with it:]

In this view, the only account I know how to give of it, is, that it is a collection of such discourses as have been written in the view of ascertaining the treatment that in point of

fact has been bestowed by Judges on certain modes of conduct regarded by it: or from thence of conjecturing what treatment would probably be bestowed on similar modes in future. And this seems the sense in which it is commonly understood. In this view at the same time it is plain, that nothing can be more heterogeneous, more unfathomable, more indefinite than its contents: nothing more dark, more impure than many of the sources of it. These contents have been long ago immense, and are and will be still increasing, and that indefinitely till some order shall be taken to the contrary. Consider it at any given period: the present for example: at the present period what does it consist of. It consists of all the Reports, all the memorials of Judicial transactions, that happen to have been already published: also of all the abridgments, extracts, digests that have been made of those reports, also of all the observations that up to the present time have been made concerning the conclusions to be drawn from those reports. In short, of whatever, good or bad, has been written on the subject of the Law. That work on which I am commenting has long ago become a part of the Common Law. This as soon as it appears from the press will be another. If any one thinks a heap of materials thus immense too great to be all taken into the composition of the body of the Common Law; let him say how much and what he will exclude: between what is to be admitted and what is to be rejected let him draw the line. I know there is a distinction between books that are '*authority*', as the phrase is, and books that are not authority: what there is in this distinction shall be considered by and by. XV *Common Law*

The individual judicial decisions are acts of Judges; they are acts of authority. But the rules of Law are general propositions: these general propositions are conclusions drawn from the above-mentioned individual acts: and these conclusions are what are formed by any one who happens to bestow his thoughts upon the subject. If he happens to be a judge, his conclusions will naturally carry more weight with them than those of a common man. He will naturally be supposed more likely to form such conclusions as shall be the same with those formed relative to the same matter by others that are Judges. His character of Judge is a certificate of his possessing a certain degree of experience and discernment, and in short a habit of thinking analogous to that of his brethren. Experience is requisite to suggest *impromptu* the stock of individual decisions sufficient to ground a conclusion relative to that matter: discernment to draw from a given stock of such materials the conclusion that is proper. A habit of thinking analogous to that of other Judges, that is of other Lawyers, because the habit of thinking on legal topics among Lawyers differs materially (as fate will have it) from the habit in use with other men.

[SECTION XVI]

COMMON LAW: REPORTS AND TREATISES

Subject of the two next paragraphs of our Author.

Books of Common Law.

OF the next two paragraphs the business is to give us a cursory view of the treatises extant on the subject of Common Law. These our Author might have divided into *historical* and *argumentative*: *historical* being such whereof the purport is simply to relate such and such particular transactions as having passed in Courts of Justice; *argumentative* the purport of which is, from the consideration of those particular transactions, to lay down general rules of Law; as either having taken or being likely to take place.*

historical, Reports.

argumentative, Treatises.

These which we have termed *historical* are known by the particular name of *Reports*. The others are comprehended under the general name of *Treatises*. With respect to these Reports and Treatises, what our Author here says of them, consists as might be expected, of a simple statement of matters of fact: viz. that there are such and such Reports and Treatises. These matters of fact it is easy to see, must be in themselves notorious: nor is
2 there any thing | very remarkable in the colouring he has put upon them. They are therefore not of a nature to require much comment.

Two passages noticed.

Two passages however it may not be amiss to notice; one on account of an observation it contains of our Author upon a matter of fact related in it: the other on account of the matter of
5 fact itself. (To p. 5.)

The first relating to the *authority* of Treatises.

Tis in the latter of these passages he touches, but very slightly, on the obscure question of *authority*. He mentions half a dozen as examples of those 'whose treatises are cited as authority': 'Glanville and Bracton, Britton and Fleta, Littleton and Fitzherbert.' 'One of the *last* of these methodical writers', continues he, 'in *point of time*, whose works are of any intrinsic authority in the Courts of Justice, and do not entirely depend on the strength of their quotations from older authors, is the same learned judge we have just mentioned, Sir Edw. Coke.' † Books cited as autho-

* In Reports, it is true, there is apt to be more show of *argumentation* than in Treatises; but this *argumentation* is not that of the *Author* of the Book: it is the argumentation only of the *Pleaders* and *Judges* whose discourses he relates. In *Treatises* it is the Author *himself* who argues.

† [I Comm. 73.]

rity' 'Books of authority' = 'Books of intrinsic authority': these phrases we must for the present be content to use, taking our chance for the import that may be annext to them, though never yet explained, nor by any means easy to explain. Of Treatises however thus much: of Reports, which are to be deemed of authority, and which not, he says nothing: though full as much depends upon the authority of *Reports*, as upon that of *Treatises*: and though the first-mentioned class of writings is that perhaps, with reference to which the notion annext to the term *authority* is the most simple. XVI *Common Law*

With respect to Reports the question of authority is, shall the assertion contained in it: viz: that a decision to such and such an effect was in such a case given and for such and such reasons be held for true. With respect to Treatises as such, the question of authority is, shall the Rule of Law laid down in such a passage be deemed the legitimate conclusion from decisions admitted to be to such an effect? With respect to | *Reports* how far they are to 6 be admitted to sway the *belief*, as true *representations* of certain matters of *fact*: With respect to *Treatises*, how far they are to be admitted to sway the *understanding*, as just *conclusions* in matter of *opinion*. Question of *authority* stated.

The idea here given of the function of a Law Treatise is not, it is true, altogether of a piece with that given us of it by our Author. This function he appears to have overlooked and to have confined his attention to another which seems only to be an indirect and accidental one. Treatises he considers merely as so many succedanea to Reports: as 'evidence', to use his own words, 'that cases have formerly happened in which such and such points were determined, which are now become settled and first principles'. Now a case perfectly easy to conceive, and which may very well exist, is, that of a Treatise proceeding upon the foundation of decisions, but those no other than what are there specified and referred to. That no treatise that is of this description is susceptible of any degree of authority at all, is what a man will hardly, I suppose, affirm: and yet by the supposition the authority it possessed could not belong to it in the capacity of an index to unspecified decisions. Historical authority it would possess none: the authority it possessed, if any, would be *argumentative*. This, it is plain, is precisely the sort of authority and the only sort that could be possessed by any Treatise, were all Partial view given of the *authority* of *Treatises* by our Author.

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decisions that were admitted to be taken as grounds for future ones, universally, as they ought to be, made public. (To p. 8.) |[7] |[8]

Indirect function of a Law Treatise.

How a Law Treatise, by being made to serve as an index to unapparent decisions, may be made to do the office of a report, how a work of the *argumentative* kind may be transformed, as it were, into an historical one, may be thus conceived. Take any passage of such an argumentative treatise. The purport of this passage is to lay down, as the result of argumentation, a general rule of Law: this rule to warrant it, requires decisions to certain effect to have been made. By admitting then the legitimacy of this rule, you admitt and assume the existence of these decisions. This then which our Author mentions, may it is true be *one* use and function of a Law Treatise: but it is only an indirect one: an use which is made of it only out of necessity: and which, where that necessity ceases, is no longer made of it. It is used as presumptive evidence of the existence of decisions to such or such an effect: but it is used as such only on supposition that there are no *direct accounts of decisions on that behalf extant.* Produce the decisions themselves; if conformable, they supersede it: if unconformable, they over-rule it. What one cannot help acknowledging on this occasion is, that the argument in any such case as this turns, in a circle. Taking that in question for a genuine rule of Law, we conclude in favour of the existence of such decisions as are requisite to support it. Then back again, assuming the existence of such decisions, we conclude in favour of this as a genuine rule of Law.

Direct function.

The direct function of a Law Treatise may be thus conceived. Decisions, to a given effect, being given, what is the general rule of Law to be deduced from them? The direct and natural function of a Law Treatise on any subject is to give answer to this question.

To draw the line between Treatises that *are*, and that are *not* authority, impracticable

Thus much however we are to understand from our Author, that in respect of Law Treatises a line between such as are, and such as are not of authority, is to be drawn somewhere: and that it is by antiquity, that the *place*, the *locus*, if one may so say of that line, is, in part at least, to be determined. |[9] What is that *Locus*? this our Author, with very good reason has not taken upon him, any otherwise than by approximation, to determine. '*One* of the last' 'whose treatises are authority' 'is Sir Edw. Coke.' Coke's last treatise was written in 1628. The very last? this he

does not say. Sr. M. Hale died in 16[76]. This in point of time is no inconsiderable distance. Yet could our Author undertake to say that while Coke's authority is perfect, Hale's is none at all? I believe hardly. I believe there is no one who would find it an easy matter to determine with himself that the *authority of* Hale, (I mean even in the particular sense here given to the word authority by our Author) is at all inferior, much less to what degree it is inferior, to that of Coke. XVI *Common Law*

The misfortune is, that allowing the line to be drawn anywhere through a certain point, we are not much the wiser. Allowing, (to speak in metaphors, and on this subject we can speak no otherwise than in metaphors) allowing, I say, a certain assemblage of writers to fall within the line, still are we almost as much at a loss as ever. Allowing the *specific gravity* of those without it to be below 0, still for that of those within it we are without a measure. Bare antiquity alone is not that measure. Glanville is more ancient than Coke: yet were Glanville to be found to lay down one rule of Law, and Coke an opposite one, should we | defer to the rule deliver'd by the elder of these writers, in preference to that of the more modern? I believe hardly. The Law we should say, was changed. ...and useless. 10

With regard therefore to Law Treatises of the *specific gravity* of authorities there is no ostensible, no common scale. Every man, pleader or judge, makes up for himself fragments of such a scale, *pro re nata*, as it happens: and whether in any case that of the pleader shall happen to be the same with that of the Judge is a matter of cross and pick. Nor did any man, I suppose, ever think it worth his while, or so much as possible, to mark out even for himself such a scale, entire.

Yet further. Conceive still the line to be drawn at pleasure as before. Those that are without it, are nevertheless consulted, notwithstanding. Some weight therefore in *fact*, if not in *words* is given them. Are these all upon a par? this will hardly be said. There is a scale therefore even for these. Of these then that *are not* authority, take that which stands highest upon the scale, and compare it with that which stands lowest upon the scale of those that *are* authority. Is it clear how much the former is to *weigh* less than the latter? is it clear that it is to weigh at all less? I believe not.

Upon this footing stands the authority of treatises: upon the So of *Reports.*

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same footing nearly stands the authority of Reports. Here an acute stickler for the |[11] Common Law will step in and say; 'No: for of the Reports some are licensed; others not: The license draws the line.' Now indeed if there were any such usage in Courts of Justice as not to suffer those which are not licensed to be quoted; there might be something more in this objection: but this is not the case. The antiquity and reputation of the Author being given, there is very little question whether licensed or unlicensed. I say nothing here of Sr. James Burrows's. The author has the demerit of being living: and the further demerit of recording the transactions of Judges who are living likewise. I will take care and go back far enough.

Instance, Siderfin's and Shower's.

The Reports of Siderfin are licensed: those of Shower are not. Should they ever come in competition, will any one say that the authority of Shower weighs the least? I believe hardly. I believe on the contrary there are few, perhaps none, either on the Bench or at the Bar, who would not be ready to give more weight to the latter than to the former.

The Common Law being considered as an assemblage of words, any Law-Book whatsoever is a part of it.

From what has been said, thus much I trust is manifest that the whole affair of *authority* remains in that 'glorious uncertainty' in which Lawyers are accustomed with so much tranquillity to behold every object they are concerned with, plunged. (To p. 12.) |[12] At the same time it will serve to confirm what has been intimated in another place, that by the Common Law considered as an assemblage of certain words can be meant nothing less than the entire and undiscriminate collection of whatever has been written on the subject.* The weight of authority between the several writers throughout increases and decreases by gradations so insensible and so indescribable, that it is impossible to draw the line so as to exclude any, without including some others whose title to admission is as equivocal as that of some at least that are excluded.

Law Sages canonized by the same rules as Popish Saints.

What is curious in this business is, to observe in what manner merit grows out of antiquity. A writer whose work if living no Judge would endure to hear of, place him a few years higher |[13] becomes invested with the robe of authority, and takes his seat among 'venerable sages of the Law'. When it is that a book is exactly old enough and exactly judicious enough to become authority, it is not easy to say. However in general perhaps it

* [See page 156.]

may be said that the weight of a writer's authority is in the conjunct ratio of his supposed intrinsic merit and his antiquity: but a certain degree of antiquity is a requisite not to be dispensed with. In treatises, considered as aids to conjecture, it is not *any* degree perhaps, of merit, that would give the authority of a living writer the *preponderance* over that of a dead one. Lawyers with respect to their *sages* as they call them seem to have done by tacit agreement what Popes in respect of their *saints* have done by an express rule; deferred their canonization till those who could give testimony of their frailties shall be no more.* XVI *Common Law*

| [2] The other passage that seemed worth noticing is one of those few instances, so valuable because they are so rare, in which our Author in speculating upon the state of our Jurisprudence, has chosen to employ his critical powers rather in pointing out than in glossing over its defects. The other passage relating to the Non-publication of Reports.

'The reports', he tells us, 'were', during a certain period, 'taken by the prothonotaries, or chief scribes of the court, at the expence of the Crown, and published annually, whence they are known by the name of Year Books.' 'And it is much to be wished', continues he, 'that this beneficial custom had under proper regulations, been continued to this day: | for, though King James the 3 first at the instance of Lord Bacon appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the 8th to the present time this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination.'

Thus far even our wary author: 'the custom beneficial': 'the institution wise': For all this I would not swear, that there are not those who would maintain to you, that it was needless. I mean aloud, and in the face of men: while in a corner pulling our Author by the sleeve, 'Tush, man, thou hast play'd us false.'

* Our Author, himself, lay him in his coffin, ought after a certain number of years, in the natural course of things, to commence *Sage*. But alas! who knows but, by that period, the spirit of canonization may be extinct. It already burns visibly weaker than it has done. The effect of this comment, if it has any, will not be to increase the flame. In the space of an odd century or two, a dead lawyer may be no more than an ordinary man.

XVI *Common Law* The omission censured.

Every man according to his temperament and his views. Our Author sees wisdom in the institution. My fate it is, to see a want of common care or common justice in the disuse of it: an indolence equal to Sardanapalus's, if from inattention: a cruelty greater than Caligula's, if from design.

Caligula's device it was to ensnare by half-published Laws.—He hung them up high and in small characters. Caligula hung *his* up high: but he hung them up. Our Judges hang not up
4 *theirs* at all: | nor will they that others should do it for them. Him who would do it without license they will punish, and they will license none.*

A collection of Reports, however, a Law history, in bits and scraps, we have. From time to time this or that straggler does venture upon the forbidden task. True: but him the Tipstaff stands grinning at from under the Judge's Robe. Reports, such as they are, we have. The thanks are due, to what? to the activity of men in office? No: but to their inconsistency, their impotence, or their remissness. Our Author, as we have seen, has whispered his complaints: but the slumbers of the Bench are not to be broken by his soothing accents. Some rougher voice must sound itself in their ear; and sound perhaps in vain—'Masters, while *ye* sleep, *we* are tormented: Because we obey not, ye punish *us*, and if a man would shew us how, ye punish *him*.—Or put it in our power to be innocent, or confess *yourselves* the authors of *our* crimes.'

* See Preface to Sr. J. Burrows's Reports of Decisions in the time of Ld. Mansfield. The first book of reports in which the Lawyer has been taught to speak the language of the Scholar and the gentleman. This offence of bringing to light their secrets they are pleased to stile *Contempt of Court*. If this then is to be the language, be it so. To speak the truth then of this illustrious above-mentioned Magistrate and his colleagues, what are we to say? that they will be held more and more in honour, the more they are thus contemned. And of the Reporter, that no one was ever more worthy to contemn them.

[SECTION XVII]

ROMAN LAW: HOW FAR CONSENTED TO BY THE PEOPLE?

'THE Roman Law,' continues our Author, 'as practised in the times of its liberty paid also a great regard to custom; but not so much as our Law: it only then adopting it, when the written Law was deficient.' This passage runs sweetly smooth; but the meaning of it I must confess myself altogether at a loss to fathom. I shall not begin with enquiring in which of its sense the word Custom is to be understood here; let it be understood in which it will, something if we may believe our eyes seems here intimated of it, which cannot be true of it in any one. 'Custom' by 'the Roman Law' was 'adopted' 'only' 'when the written law was deficient.' 'The regard our Law pays to it is greater.' How greater? By adopting it in preference to, in despite of the written Law? so we might suspect, were we to stop and to look no farther than this sentence. But our Author goes on—'Though the reasons alleged in the Digest will fully justify our practise, in making it of equal authority with, when it is not contradicted by, the written Law.' Here we are turned round again and given to understand, than when contradicted by the written Law it is not of equal authority that is it is of none at all. Here then we find ourselves between two straights. The Roman Law did adopt Custom when the written Law was deficient; we do *not* adopt it when the written Law is contrary. And yet the regard we pay to Custom is greater, than the regard the Romans pay to it. Between the two extremes it seems rather difficult to find room for this gradation. Certainly nothing has our Author given us to facilitate our finding it. Let us see whether we can find it of ourselves. | 2

What may have been the regard paid by the Roman Law to *Custom* in any sense of the word I will not undertake to say: it is needless to enquire. Our business is to shew, if it can be done, how it may be that our Law should have paid a greater regard to Custom than merely the adopting it only where the written Law is '*deficient*', and yet not so great as to adopt it where '*contradicted*' by that Law. To do this we must once more resolve the

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word '*Custom*' into its different sense. We must settle with ourselves what we mean *by the Law* when we speak of it as making *Custom* and the *written Law* objects of its regard: we must understand what it is for custom to '*contradict*', and what it is for it '*not*' to '*contradict*' the *written Law*.

By the Law, it is plain, is meant the Judges. They it is who administer the Law; who make its influence perceivable: who do what in any individual instance is said to be done by it. They are the persons who being of various ranks and admitting of various descriptions are often for shortness sake characterized under the name of the one metaphorical personage the Law. |

3 The written Law may be said to be deficient with respect to any mode of conduct, when there is no regulation of written Law concerning that mode of conduct: that is, either commanding, forbidding, or permitting it. This then according to our Author is the case with every mode of conduct with respect to which Custom was adopted by the Roman Judges. This Custom here spoken of we must distinguish as usual into Custom *in pays*, and Custom *in foro*.

First with respect to a Custom *in pays*. They never legalized any habit of conduct, which by any express article of the Statute Law had been either. To legalize a habit of conduct is to punish the non-observance of it. In the first place then, they never punished the non-observance of any habit of conduct when it was forbidden to be observed or left free to be observed by the Written Law: but secondly, no more did they even when forbidden to be observed: that is, neither under any other penalty than that under which it was so forbidden, nor by means of any other mode of prosecution than that which was appointed or accustomed for offences against the written Law. For to have punished it by the same penalty under which it was forbidden

4 by the | Written Law, and at the same time according to the same mode of procedure by which the regulations of the Statute Law are appointed or accustomed to be enforced, would be not to legalize the custom in question by their own authority, but to give effect to the disposition of the Written Law. The fact then, we are to understand, was, that if ever they had by an act of punishment, legalized a custom, by punishing the non-observance of it by a certain mode of punishment, and in a certain mode of prosecution, then if any regulation of written Law came

to forbid such mode of conduct, or leave it free, they of course ceased to punish the non-observance of it altogether; or if to command it and under a different penalty than that by which it was before punished, and to make it punishable by a different mode of prosecution from that in which it was before prosecuted, they ceased punishing it by such prior mode of punishment, and by means of such prior mode of procedure (tho neither were expressly forbidden by the regulation) and confined themselves to the mode of punishment, as well as of procedure appointed by such regulation. XVII *Roman Law*

I here suppose the legalizing regulation, to come after the legalizing decision: for suppose any such regulation to come before such a decision, then | at the time of making the decision, 5 the custom is not what we have supposed it to be, spontaneous. This then is what is done with respect to a Custom *in pays* at first spontaneous afterwards legalized by the Judges' own authority and lastly by authority of the acknowledged Legislator. When the written Law speaks, the Judiciary Law, if one may so call it, not only speaks not to the contrary, but is put to total silence.

2dly. The same thing it is easy to understand with respect to an individual mode of conduct *in pays*, legalized by a single act *in foro*, an act referred to custom, because done in conformity to habits of proceeding in the same court, of similar tho' perhaps not strictly of the same description. In such a case for a given Judge to adopt custom, in our Author's sense, is for him to frame his decision in the instance in question upon the pattern of preceding decisions of his own and his predecessors. 3dly. If the acts serving to legalize such a mode of conduct have been more than one, so many more as to have grown into a custom *in foro*, it makes no difference. For one single judicial decision unreversed, is as much as is necessary, at least with respect to the individual persons and things that are the objects of it, to establish a point of Law.

All this will be much better understood by the help of an example. This example we shall take from our own Law, as it is that more than the Roman, that it is our business to illustrate. Of an individual act first legalized | by Judges of their own 6 authority, and then afterwards by an act of the Legislature it will be easier to find an example, than of a spontaneous Custom —at least, of the two, the example of a point of law established

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by a decision pronounced according to appearance on the occasion of a single mode of conduct may be found more interesting, and more easily explained than of a point of law established the other way. And we may here meet with examples of a mode of conduct so interesting and so familiar as to have been characterized by a single name. Let Perjury be the instance of such a mode of conduct. Here the mode of conduct legalized is the forbearance of the complex mode of action characterized by that name. Judges by punishing some instance of the sort of act thus named, may be said to have legalized, that is rendered obligatory the forbearance of it. A mode of action thus mischievous is plainly of such nature that it is not any custom of forbearing from it, but the mischievousness of the act that the Judges would look to as a warrant for their punishing the act, that is, for their legalizing the forbearance. It is not therefore on a spontaneous custom of forbearing from such an act that the Judge we may suppose, whoever it was that first punished it, grounded his decision.

Be this as it may, Perjury by some Judge or | other, at some time or other, first began to be punished. It was thereby made an offence: and being still punished by Judges in the same way, is still an offence against unwritten Law; an offence, as we say, at Common Law. It is since become an offence against Written Law. By Common Law it was made punishable by Fine and Imprisonment. By certain Statutes it has been made punishable by Transportation.

Now then to apply to this instance what our Author says with respect to the difference between the regard paid by our own Judges to Custom, and that which he supposes to have been paid by Roman Judges. Perjury, upon being made punishable by written Law with transportation would according to the mode of decision observed by Roman Judges be no longer considered as punishable by imprisonment and fine: Because it was only 'when the written Law was deficient,' that 'they adopted custom', or in other words, that they took for the pattern of their decisions the decisions of their predecessors. Where the written was present, it superseded and expelled the unwritten. On the contrary, according to the mode of decision followed by our Judges, Perjury after having by virtue of a regulation of written Law been made punishable by transportation, continues punish-

able (at option) by fine and imprisonment as before. Thus it is that to use our Author's words, 'our practise,' . . . not confining itself to 'the adopting'|[8] Custom 'then only', 'when the written Law is deficient', makes 'it of equal authority with where not contradicted by the written Law'. XVII *Roman Law*

Whether the notion here given of the regard paid by Judges to Custom or to speak more properly to unwritten Law in comparison with that paid by them to written Law be just or no, let the experienced judge: thus much must appear, that it is a notion which our Author's words are very imperfectly, if at all, calculated to suggest.

Of 'this practise', our Author thinks he has found a 'full justification'. It is contained in the 'reasons alleged' in a passage of the Digest which he here translates. For since, says Julianus, the written Law binds us for no other reason but because it is approved by the judgment of the people, therefore those laws which the people have approved without writing ought also to bind every body. For where is the difference, whether the people declare their assent to a law by suffrage, or by a uniform course of acting accordingly? Thus concludes our Author 'did they reason while Rome had some remains of her freedom but when the imperial tyranny came to be fully established, the civil Laws speak a very different language'. He then quotes some passages from Ulpian which we shall come to presently. It must be acknowledged positions built upon the first sentence of this passage coming out of the mouth of the titled slave of a Roman Emperor is not a little singular: though what 'remains' 'Rome had' | at 9
that time 'of her freedom' in the time of Julianus more than she had in the time of Ulpian, it would be hard, I believe, to say.* Under our own government the freest and most excellent with all its imperfections of any the world ever yet saw, I should be glad to see any thing like such a doctrine avowed by the Legislature. I should be glad to find any passage in any act of Parliament where the good liking of the people, I mean the body of

* I have not the passage in the Digest by me. But the Julianus here mentioned, I take it for granted is Salvius Julianus who was Consul under the Emperor Adrian Ao. Dom. 116. Ulpian died Ao. Dom. 226. See Dufresnoy's or any other Chronology, or Beaver's *Hist. of the Civil Law*. The Lex Julia, by which the people transferred or at least communicated their whole Legislative authority to the Emperor alone, had been passed A [131?] in the time of Julianus. It passed Ao. [131?].

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the people at large is openly alleged as a consideration meriting to be attended to. No, the productions of our popular Legislature are still tainted with the breath of ancient despotism.

To my ear, a sentiment vouching the will of the people as the sole foundation of the authority of Laws made by a sole Legislator, without taking that will the least into consultation: a sentiment so popular in the mouth of the minister of a prince so absolute as was at that time a Roman Emperor can be looked upon no otherwise than as a mockery, or a contrivance to gild the sophistry that follows in the next sentence: which sophistry however being written so long ago, and in Latin, passes for sterling with our Author.

'Where', says this Lawyer, 'is the difference whether the people give their assent to a Law by suffrage, or by a uniform course of acting accordingly?' 'Where', he might just as well have said, 'is the difference between a free and a despotic government? Where is the difference between acting by coercion and acting spontaneously?'

The fallacy lies in the abusive application of the term 'assent': in the giving to a uniform course of action according to a Law, after that Law is | passed, and punishment threatened for the breach of it that same name '*assent*', as is given to an express declaration of the party's will with the Law before its passing.

Thus it is that conditions of things so opposite as Liberty and slavery are confounded in our Author's turbid apprehension; dupe or accomplice of the chicanery of imperial sophists.

Thus did they reason, says our Author, while Rome had yet some remains of her freedom; but, continues he, when the imperial tyranny came to be fully established, the civil Laws speak a very different language. 'Quod principi placuit legis habet vigorem, cum populus ei et in eum omne suum imperium et potestatem conferat,' says Ulpian. 'Imperator solus et conditor et interpres legis existimatur,' says the code. And again, 'sacrilegii instar est rescripto principis obviari.'

One cannot help calling to mind upon this occasion the suspicion entertained by the Corinthians concerning St. Paul.* The business which he had proposed to himself in this paragraph and which he has carried on in the outset and the conclusion of it was, to state, the comparative regard paid by Judges to the

* 'Much learning hath made thee mad.'

unwritten Law, to the sort of Law made by their predecessors; XVII
and to the written | [11] Law, that is, to the sort of Law that is made *Roman Law*
by persons acknowledged for Legislators: in the next place, to
draw an inference to the advantage of the unwritten Law from
the idea of it, false as it is, that he has given. In the course of
this business, something happened to occur to him that had been
said by the minister of a Roman Emperor in favour of the bind-
ing force of the unwritten Law. It happened that in the same
passage the same Lawyer had dropt something about the Statute
Law. From thence our Author takes occasion to speak of the
different constitutions of the Legislative power, as if that had any
concern in the business that was before him. The sovereign Legis-
lature | whether lodged in the hands of one or many, whether 12
that one or those many take it by succession or election, is as
much sovereign in one case as in the other; its commands as
much superior to the commands of Judges. Is the authority of
the decisions of former Judges, is the authority of custom, if it
must be called custom, a proof of the freedom in the constitution
of the Legislature, then is the constitution of France a free one.
Nowhere else does Custom make a greater figure.

Our Author however comes back from his digression, and in conclusion says 'And indeed* [it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people'].

Let us deal fairly by our Author, and confess that in this notion of his he is by no means singular. It is indeed a vulgar and popular error among Lawyers; dear to their prejudices, and by no means unfavourable to their passions.

I hope it is by this time pretty apparent, that what is called the Unwritten Law is made not by the people but by Judges: the substance of it by Judges solely: the expression of it, either by Judges, or by Lawyers who hope to be so. Now would I ask, which | had most of the people's voluntary consent to it, a sort 13
of Law made by persons, at least some hundred of them chosen by the people, or a sort of Law made by companies of four men called Judges, every one of them appointed by the Crown? Of Judges, and of other Lawyers, it is true some are, others may

* [Passage left blank supplied from I Comm. 74.]

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hope to be, Legislators. But there was a time when no Lawyer could hope to be a Baron: when to be a deputy of the people was to be a helpless butt of the Royal indignation: Nor do those who live now want to be told, that one out of four is more than one out of eight hundred.

Should there be a Judge who enlightened by genius, stimulated by honest zeal to the work of reformation, sick of the caprice, the delays, the prejudices, the ignorance, the malice, the fickleness, the suspicious ingratitude of popular assemblies, should seek with his sole hand to expunge the effusions of traditionary imbecility, and write down in their room the dictates of pure and native Justice, let him but reflect that partial amendment is bought at the expense of universal certainty; that partial good thus purchased is universal evil; and that amendment from the Judgment seat is confusion.

Appeals to division of unwritten laws into general: customs ascribed by Blac: to particular: district.

[SECTION XVIII]

COMMON LAW: PARTICULAR CUSTOMS

THUS much concerning the first of the three divisions our Author makes of Common Law: namely General Custom, or the Common Law properly so called. 'The second branch', continues he, 'of the unwritten Laws of England are particular customs, or Laws which affect only the inhabitants of particular districts.' So far our Author.

On this head we shall the less need to be particular, having been so full on the foregoing. Not that our task is by any means at an end: for here we meet with examples; and examples may afford light when the text is darkness.

'These particular customs', continues our Author, 'or some of them, are *without doubt* the remains of that multitude of local customs before mentioned, out of which the Common Law, as it now stands, was collected at first by King Alfred, and afterwards by King Edgar and Edward the Confessor: each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors and lordships, were very early indulged with the privilege of abiding by their own customs in contradistinction to the rest of the nation at large.'

'Such is the custom of Gavelkind in Kent and some other parts of the kingdom (though perhaps it | [2] was also general till the Norman conquest) which ordains, among other things, that not the eldest only of the father shall succeed to his inheritance, but all the sons alike:* and that though the ancestor be attainted and hanged, yet the heir shall succeed to the estate, without any escheat to the Lord. . . . Such is the custom that prevails in divers antient boroughs, and therefore called *Borough-English*, Gavelkind. Borough-English.

* This is in page 74. It was but in p. 68, we may remember, that the proposition 'That the eldest son alone is heir to his ancestors' was cited without scruple or hesitation among the maxims expressive of the general customs, which in the page preceding he had told us are of higher antiquity than history can reach.

XVIII *Common Law* that the younger son shall inherit the estate, in preference to all his elder brothers.... Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas at the Common Law she shall be endowed of one third part only.... Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold-tenants that hold of the said manors.... Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns; the right of holding which, when no royal grant can be shewn, depends entirely upon immemorial and established usage.... Such, lastly, are many particular customs within the City of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters; which are all contrary to the general law of the
3 land, and are good only by special custom, though those | of London are confirmed also by Act of Parliament. To this head,' continues our Author, 'may most properly be referred a particular system of customs used only among one set of the King's subjects, called the custom of merchants or *Lex Mercatoria*; which however different from the Common Law, is allowed for the benefit of trade, to be of the utmost validity in all commercial transactions; the maxim of law being, that "*cuilibet in sua arte credendum est.*"'

To this head then it seems, namely that of particular customs, our Author would refer the system of customs used among merchants; but with what propriety I do not altogether understand. By Merchants he means, I suppose, Traders: Traders, wheresoever settled throughout the Kingdom. By Merchants we understand in common speech that sort of traders whose traffic is with foreign countries, and in wholesale. What is called in Technical language the Law of Merchants is a branch of Law that concerns Traders of all sorts. Of this it might have been as well for our Author to have given notice. Now the class of Traders will be allowed to be at least as numerous I believe, as that of Landholders. If then the customs relative to the mode of succession observed by landholders, are general customs, why those relative to the modes of contracting observed by Merchants should be less general, is what I do not see.

Here if our Author would have favoured us with an example or two we should have been much obliged to him.

What distinguishes a Trader from another man, is the frequency of his entering into the contracts of buying and selling: particularly the latter. Not that | [4] he alone is in use to enter into that contract, but that he is in more frequent use than any other is. When a man is so much in use to buy and sell that he may be presumed to reckon upon profit, and upon that profit as a part at least of his settled livelyhood, he is deemed by law a trader, for the purpose of being liable to be declared a Bankrupt. XVIII *Common Law*

Now the Common Law (such is the general rule of it, after certain exceptions made) adopts all contracts: turns them into so many regulations, the purport of which is settled by the parties, while the law lends them its binding force.

If then the Contract enter'd into between two traders is different from a contract enter'd into by two other men; equally so may be the contract enter'd into by these two other men from one enter'd into by any third pair. The law relative to the contract of either of these two last pairs, would not be reckoned different from the Common Law, since it would be a part of it. Why any more should that relative to the contract between the first?

| This first part indeed may be reckoned different from another part just as any other may; but with what propriety can one any more than another be said to be different from the whole? 5

In two particulars it may be that the Law relative to contracts between Traders shall be different from the Law relative to the same contracts between other people. It is not all contracts that the Law adopts. It may be, that a contract which if made by two persons not merchants it would not adopt, made between two that are merchants it will.

The forms of contracting are short and imperfect: many conditions and consequences that are intended and many others that if thought of, would have been intended to be annext are not expressed. It may be that a condition which to a contract enter'd into between persons not traders it would not annex, to a contract between persons that are traders it would, or vice versa. In either of these cases the Common Law relative to Traders may be said to be 'different' from the Common Law relative to other people. But with what propriety can a branch of Law which with respect to its field of jurisdiction is so diffusive, be stiled particular? A custom concerning Carriers the general

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custom of the realm: A custom concerning all traders a particular one.*

Be this as it may, the Custom of Merchants, different as our Author conceives it to be, is allow'd to be valid; of the utmost validity, says our Author, as if in validity there were degrees, or as if there were any medium between valid and not valid. And here a sage maxim of the Law is introduced, clothed in wonder-working Latin. 'The maxim of law being', says our Author, '*that "cuilibet in sua arte credendum est*"' but to what purpose introduced, or how it doth apply, is what I must confess I cannot very clearly see. If the business had been to justify the calling in traders to prove whether such or such a custom among them has subsisted, the maxim had been well applied; but to apply it to justify the making such a custom obligatory seems more than it appears to warrant. To prove the existence of a practise is one thing, to prove the expediency of establishing it by force of law is another. It may be very true that by virtue of experience and reflection this sort of persons like any other may be the readier to understand what is best for them than strangers, but this is more than the maxim intimates.†

* For examples see Beawes's *Lex Mercatoria*, p. 36.

† Immemoriality. It is plain this could not have been, from the first, essential to the validity of a custom.

† It must be remembered this is not itself a treatise on the Law, but a comment on one that is. It can be regular, therefore, no further than the text is regular. Had I to write a treatise on particular customs, I should look over the assemblage of all the particular customs of which there is intimation in the books, in order to lay down such general rules as might seem proper to lay down concerning the principles of their legality.

† You have horses to let. I know you—I have been used to deal with you. I should be glad to pay you, to have such a horse tomorrow. Sir, say you, he is at your service. Here is a hiring—Here is a contract enter'd into. What am I to pay for him? How long am I to keep him for? What if any accident should happen to him by his own act, by yours, by that of your servant? All these are events not provided for by the terms of the contract, but which tend to bring a burthen which one or other of us will be obliged to bear. Which of us then shall bear it.—If we have not determined for ourselves it is the Law that must determine for us.

† Particular Customs it is to be observed he has explained by calling them laws which affect only the inhabitants of particular districts.—Now in what particular districts is it that Traders live?

[SECTION XIX]

COMMON LAW: PARTICULAR CUSTOMS—RULES

OUR Author's next business is to lay down some rules relative to particular Customs. *The* rules, he says, persuaded as it should seem concerning the rules relative to particular customs, as before we found him concerning *the* kinds of Statutes, that like all the other portions of his divinity the Common Law they are eternal *a parte ante* and *a parte post*, necessary unchangeable, that as they were in the beginning they are now different neither *actu* nor *in potentia*, from those he gives us.

— ins. 1—*The* rules, says he, relating to particular customs regard either the proof of their existence; their legality when proved; or their usual method of allowance.

Under the Title of rules relating to the usual method of allowance of a particular custom, few readers, I believe, would grasp what is prepared for them. Under this title, what he gives us, is an observation of his or whosoever it be, that a decision legalizing a custom is not understood to warrant the legalizing of a mode of conduct of the same description under circumstances analogous only and not identical: in other words that powers given in deference to local custom under a given set of conditions are not understood to warrant the conferring the same powers under a set of conditions analogous only and not identical. Useful and instructive as the observation is of itself, at least in the way of warning though not very easy to apply in the way of rule, under such a title no one would expect to find it. To speak the truth, it seems very difficult to frame a title for it. Perhaps the following might answer the purpose a little better. Of the stress laid on them as a ground-work for reasoning by analogy—or of the deference paid to them in cases of a similar sort but not the same —Lord Bacon seems to mean the same thing when he lays it down as a rule of advice—*Let Reason be pregnant, Custom barren.* At least this is one of the senses that may be put upon it.

And first we will consider *the* rules of proof. Relative to the proof of existence there are one cannot well say how many. Relative to their legality when proved there are exactly seven,

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marshalled and display'd with great precision. And so unchangeable are these rules relative to legality, that the purport of the greater part of them is to reprobate so many supposed sorts of customs upon the ground of non-existence.

The rules of proof we shall content ourselves with barely reciting in order not to break the thread of the discourse; the rules relative to legality will demand a more particular examination.

'As to Gavelkind, and Borough-English', continues our Author, 'the Law takes particular notice of them; and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs
2 must be particularly pleaded, and as well | the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. The trial in both cases (both to shew the existence of the custom, as "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female", and also to shew that the lands in question are within that manor) is by a Jury of twelve men, and not by the Judges, except the same particular custom has been before tried, determined, and recorded in the same court.'

'The customs of London differ from all others in point of trial: for if the existence of the custom be brought in question, it shall not be tried by a Jury, but by certificate from the Lord Mayor and Aldermen by the mouth of their Recorder: unless it be such a custom as the corporation is itself interested in, as a right of taking toll, etc., for then the Law permits them not to certify in their own behalf.'

Thus far our Author: this latter paragraph however must not pass entirely without observation. In the first place, 'If', says he, 'the existence of the custom be brought in question'; he means if it be brought in question in any of the superior National Courts: then the certificate is to be made to the Court in question in the manner that he mentions; but what if it be brought in question in the City Courts themselves? no certificate certainly is given then.

In the next place it is curious to observe how the word '*by*', has in the course of a single line shifted its signification. In the expression '*by a Jury*' it intimates a person: points to the persons of the triers. In the expression '*by a certificate*' it points to a thing:
3 to the piece of evidence that is to be | laid before them. If then

the word 'by' was to be used in both cases, he should have said that in the 1st case the custom is to be tried by a Jury, in the 2d case by the Judges of the superior court upon certificate, as above mentioned. In the first case it is the Jury who are to try the point, taking such evidence as happens to be offer'd them: In the second, it is the Judges, taking for evidence such certificate, and nothing more. XIX *Common Law*

'When a custom is actually proved to exist', continues our Author, 'the next inquiry is into the legality of it; for if it is not a good custom it ought to be no longer used. "*Malus usus abolendus est*" is an established maxim of the Law.'

More shifting of signification. 'If it is not a good custom, it ought to be no longer used' . . . Here good means deserving of approbation: the inference is that if good it ought not to be constituted legal, obligatory, binding, or which is the same thing, valid. 'To make a particular custom good', the following are necessary requisites.—Here good means valid, as is manifest from considering what are these requisites. These are that it be 1st immemorial, 2dly, continued, 3dly peaceable, 4thly reasonable, 5thly certain, 6thly compulsory, 7thly consistent with other customs.

Here however we must make a pause: and before we proceed to the examination of the respective rules exacting these | qualities in a custom, we must explain a little more particularly than has been done hitherto the legalizing of a custom. 4

The first quality which, according to our Author, a custom must possess in order to be legal, that is, fit to be legalized by a judgment of a superior court is, that of being *immemorial*. To use our Author's words, That it have been used so long, that the memory of man runneth not to the contrary. So that 'if any one', continues he, 'can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of Parliament; since the Statute itself is a proof of a time when such a custom did not exist.'

Thus far our Author. In this quality considered as a requisite to the validity of a custom there is something very remarkable. It is plain it could not have been deemed so from the first: for at this rate no custom could have been ever legalized. What one should be very glad to know therefore, were it possible, is, when this requisite to the validity of a custom first came to be made so.

XIX *Common Law* This is a matter I shall leave to the enquiries of the curious. Howsoever this be, the full establishment of such a rule makes a very important epoch in our legal polity. Twas under favour of the confusion occasioned by men's not distinguishing between a custom purely spontaneous, and a custom rendered compulsory (whether in its origin so or not) by an act of the local jurisdiction, tis by this means I say, it seems probable the establishment of it
5 was effected. They began, | we may suppose, (I am speaking of the judges of the sovereign Court) with a Custom purely spontaneous: they determined of some Custom or other of that description, that it should [not] be held a good one, for this reason, because a time could be remembered when it did not subsist. The individual custom in question, we may suppose had subsisted but for a very short time: or perhaps they did not like it. Be this as it may a determination so grounded, was at any rate consistent enough with the just grounds of legal determination. By a fundamental principle of utility recognized by all Laws, no man is to have his hands bound or to be compelled to do a thing without some reason can be given for it. Here then the only reason that could belong to the case, viz. utility, derived from expectation, did by the supposition not subsist, at least in its full force. The expectation of the party favoured in whatsoever it were by the custom could not be a very perfect one; since a time appeared when he was not thus favoured. Having got thus far, it was a stride not so great altogether in appearance, but a vast one in effect, to disallow on the same ground a custom legalized in the Court below. This was aiming a violent and decisive stroke at the local judicatures. It was saying to these judicatures Henceforward you shall exercise no jurisdiction but in the same cases precisely in which you have been used to exercise it. No spinning out any further your jurisdiction by analogy. A sense of the benefits of uniformity and the measures of Justice throughout the kingdom, disgust at the ignorance or corruption of the local
6 judicatures, the political view humbling | subordinate authorities in favour of that of the Crown, all or any of these might have contributed to recommend to them such a measure. What is remarkable is, it is the want of regularity and consistency in the inferior jurisdictions that could have prevented this blow from being so severe upon them as it might have been otherwise. Had any regular and instructive memorial been taken of their

proceedings the original of every course of decision must have appeared. No decision of course could have appeared but it must have appeared to be of no force. But as this was not the case, but the epoch of the first decision forming a custom *in pays* or giving legality to one already formed, being involved in the same obscurity as that of the first act of a custom purely spontaneous, the former preserved some sort of influence by the same means as the latter. That the proceedings of these local tribunals were originally to the last degree irregular and obscure is very plain. Customs bearing so hard upon the party burthen'd as customs do that are relative to the succession to entire estates could never have been, as we have remarked, in their origin spontaneous. Tis by the act of some local tribunal they must have been established. Such an act then a custom of this sort must have had for 'the beginning of it'. If then this act could have been shewn, the custom according to our Author could not, at any time since the establishment of this requisite, have been good. But Customs of this sort we know of, that have been held good and passed since then unquestioned. | Littleton could afford 7
us an example.* In his time he tells us that by Custom in some Boroughs a man might dispose of his lands by Will. This custom we may be sure could not have been in its origin spontaneous. In this Custom, the Heir was the party burthen'd. Whensoever it happened that a man first attempted this disposition, the Heir having been used to *expect* the Estate, to look upon it as that which was to be his after the death of that his Ancestor, we can hardly suppose would sit still and see it thus strangely given away from him. At the utmost if one Heir by some particular circumstances might be induced thus spontaneously to acquiesce, it is impossible to suppose it of a number of Heirs one after another. Litigation must therefore have ensued. The dispute must have been carried before the tribunal of the place: that Tribunal must have decided in favour of the Devisee. This decision then must have been the beginning of the custom. If this decision could have been shewn when first the question came before the King's Courts, the beginning of the custom could have been shewn. The Custom then, if this rule had at that time taken place, must have been deemed a bad one.

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Once more as to the meaning of the words memory, immemo-

* Ch. 10, Sect. 167.

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rial: as to the sort of memory which if it 'ran to the contrary of a custom' destroys the '*goodness*' of it. Upon what sort of evidence is it rested? Is oral evidence alone to be admitted to establish or overthrow it, or is written evidence also to be admitted. If oral evidence, is that only which is direct to be admitted, or is hearsay also to be admitted? None of these obvious
8 and necessary questions are resolved by | any of all that variety of phrases of which '*memory*' is the leading term.

If the only evidence admitted on either side were direct oral evidence, that would reduce time of memory to a very short period; to within the compass of the life of the oldest man in the place in question who happens to remember anything about the matter: at the utmost to within the compass of a single life. But it is well known that at present, at least, in point of practise, hearsay traditionary evidence along with direct is admitted in proof or disproof of a custom: and written as well as oral. Now comes the difficulty we started in a former chapter. If any written evidence whatsoever at any distance whatsoever were to be admitted in proof of a time when such a custom could not have subsisted, this would demolish a great part of it, if not all the customs that we know of. For allowing it to have subsisted in the place in question from the time of the Normans, we may shew that it could not have subsisted in the time of the Saxons, or if in the time of the Saxons not in that of the Romans, or if in that of the Romans, not in the time of the Britons, and so on. The only way of solving it, I apprehend is this. To support the custom recent living evidence is necessary: this antient is out of the question. To overthrow it, that antient evidence alone shall be admitted which tends to represent the custom in question as
9 it has subsisted in the particular place in question. | Evidence which applies to the place in question no otherwise than in common with the rest of the Kingdom, however strong, must if we would support any custom at all, necessarily be rejected. If this distinction is not a just one, I know of no other that can be made.

Here it is that our Author takes occasion to inform us that no Custom can prevail against an act of Parliament: for this reason of all others, that the Statute against which the custom might be supposed to prevail is a proof of its wanting the requisite of immemoriality.

Now the plain reason why a custom can not prevail against an act of Parliament, is that a custom, make the most of it, has no more force than what the act of a Judge can give it: and an act of Parliament is superior to any act of a Judge. At the same time, this reason has nothing to do with the duration of the custom; because old or recent, it makes no difference. Our Author, however, not knowing what he meant when he said custom, has fancied that an Act of Parliament must be a proof of a time when the custom did not *exist*. That the act of Parliament passed against a custom must be a proof of a time when the custom was not a good one, that is at a time when Judges ought not to have holden it as good, is most unquestionable; but this is not what our Author [says]. A custom according to his own account of the matter may have existed time out of mind, and yet never have been good. If the act of Parliament has been all along conformed to, then there is no custom in the | case to set up: if it has not been conformed to, then in spite of it the custom has subsisted. If the custom has subsisted even since an act of parliament passed against it: a fortiori, so it may, before. XIX *Common Law*

The next rule our Author lays down concerning the qualities a Custom must have in order to be a good one is, 'It must have been continued:' or as he might have said, uninterrupted. 'Any interruption', says he, 'would cause a temporary ceasing: the revival gives it a new beginning, which will be within the time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*, for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom. As if I have a right of way by custom over my neighbor's field, the custom is not destroy'd, though I do not pass over it for ten years: it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end'.

So far our Author. Of this rule I must confess I know not well what to make. At first it seemed as if this *continuity* or *uninterruptedness* was given as a new and independent quality, distinct from the former of immemoriality. Accordingly he sets out with giving us to understand, that a custom is of such a ticklish quality that it will not suffer 'any interruption': any interruption that it can be shewn to have sustained, is sufficient to prevent its being legalized in the Court above. This, to understand it literally, is

XIX *Common Law* a doctrine too wonderful to pass with us. Of modes of conduct the repetition of which can form a custom of a legal nature, scarce any can be imagined, that do not necessarily admit of
11 very considerable intervals in the practise of them. | All we could understand then by the rule in this sense is that the interruption must not be a long one. Nothing more precise than this does it afford us.

So much for the rule. The exploration or limitation of it or whatever it be, plunges us still deeper into confusion. The words *right* and *possession* printed in *italics* announce a something to have been in our Author's thoughts which he would fain have communicated to us if possible. We are now given to understand that an interval so long as that of ten years between one set and another will not destroy the custom; will not, that is, make it unfit for legalization. 'But if the right', that is we are to understand, the right of the party favoured to perform such act, or to have such act performed for him, 'be discontinued tho it be for a day, the custom is quite at an end.' How this same right should be 'discontinued' before it has commenced seems rather difficult to say. By the supposition it is in the custom that the right is to be founded: tis the past observance that is to warrant the decision which when pronounced is to legalize the custom, in other words is to give the party favoured the *right* to have it observed. This is the case if the custom be supposed to be as yet spontaneous. If we suppose it to have issued from a legalizing act of the local judicature, then indeed there has been a right, such an one as the local judicature can create.

12 | This right, having subsisted, may have been discontinued. But what is the right? a right to have the practise observed. The actual observance of the practise we are to remark, is not here in question. It is not that which is supposed to be at an end or that is said to be at an end by the discontinuance of the right. The word *custom* perpetually shifting its signification means in the phrase 'the custom is at an end', the right to have the practise observed. We are then to understand that if this right, (resulting from an act of the local jurisdiction) is at any time any how discontinued, it cannot be revived. In what manner discontinued? Our Author should have given us an example. Why cannot it be revived? Our Author should have given us a reason. I am a Copyholder; or a Freeholder holding of a Manor. I have a right

of way over my neighbour's land resulting from a decision of the local judicature, resulting we will say from the declared pleasure of the Lord of the Manor, or the more regular determination of his Steward. This right I enter into an engagement not to use for the space of a year. While the year lasts then, I consent not to have it. After the year is over, my neighbour consents I shall have it. Why is it that I am never to have it again. XIX *Common Law*

Thirdly. It must have been *peaceable*, continues our Author, 'and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed at Law or otherwise is a proof that such consent was wanting.' Against this rule I see nothing to object. But I should prefer '*uncontested*' | or '*undisputed*' as less uncouth in 13
this place than the word 'peaceable'. Our Author here puts a case of a dispute at law subsisting immemorially, a *lis immortalis*. I hope for the honour of the Law such a case is not easy to be found realized. One cannot think of it without horror.

The 4th Rule he gives us concerning 'Customs', is that 'they must be reasonable'. By this we learn that they must be such as a man would *like*: Or rather, continues he, taken negatively, they must not be unreasonable; that is, as we now understand, they must be at least such as a man would not *dis*like. 'But this', continues our Author, 'is not always, as Sir Edw. Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law': By this sage and astute remark we now at last understand that what another man might think of them is of no consequence, they must be such as a Lawyer would not dislike. Now then what are the circumstances in the character of a custom, that, (to judge from past decisions) would dispose a Lawyer not to like it. To ascertain them would be a work of great instruction, but of no small difficulty. Accordingly our Author washes his hands. On this, as on so many other occasions, our Author puts us in mind of | those sage parents, who are incessantly recommending it to 14
young people to be prudent. This is mighty well; but what is prudence, that is the question. This however is what is commonly called giving good advice. With like justice may this of our Author's be called giving good instruction. Thus much however we understand from him, that it is not every custom (though endowed with the six other requisites) that superior Judges have

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thought fit to legalize. This is something, by way of warning to us to look out.

Thus much being all that is to be made of the rule, let us see whether we can make any more of the example 'Upon which account', continues our Author, 'a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the 3d of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon rather than the day before or after. But a custom that no cattle shall be put in till the Lord of the Manor has first put in his, is unreasonable, and therefore bad: for peradventure the Lord will never put in his; and then the tenants will lose all their profits.'

What our Author has given here as a custom, is in fact not itself a custom, but a limitation annexed to the observance of a
15 custom. The custom is the Tenant's making use | for the purpose of putting his cattle upon it, of the Common which in point of general ownership is the Lord's. To view the matter in the light our Author appears to do one should suppose that all that was done by the custom in question was to establish the restraint: whereas the restraint and the liberty grew together. It consists of an assemblage of acts on the parts of the several Tenants: and of correspondent instants of forbearance on the part of the Lord. Thus far might have happened through mere inattention on the part of the party at whose expence: But add now either of the limitations specified and the case bears unquestionable marks of express will. That the Tenants, meaning to take what advantage might be made of the Common, should have fallen of their own accord into the custom of waiting for that particular day of all others is not to be supposed, nor is it much more likely that they should wait for the Lord's making use of it himself. For the restraint laid in the first case it is only one out of two suppositions can account. Suppose it laid at a very early period of the feudal constitution, when Lords were in a manner absolute within their manors, and we may suppose it annext to the first verbal informal grant made by the Lord for the time being to his Villeins and other dependents.—Go, says he, make use of such a field to feed your cattle on, but mind you do not turn them on till the third of October. Suppose it laid at

a later period, after the King's Courts had set limits on every side to the power of those petty Tyrants, and given a fixed property to their Vassals in benefits derived at first from arbitrary indulgence. | Suppose this, and the restraint might have been 16
imposed by the Tenants, by some informal verbal agreement, for their own accounts. The latter restraint tending upon the face of it solely to the benefit of the Lord, could have had nothing but the Lord's pleasure for its original. Go, said the first Lord who granted the indulgence, go and use such a field to feed your cattle on, but observe not to turn them on, till I turn mine. XIX *Common Law*

Now then to consider how the two restrictions stand in point of expediency. As to the first, in point of original utility it might very probably be expedient that till the day in question the land might be left to recover itself, or might be employ'd for other purposes. Original utility therefore might be in favour of the restraint. And utility resulting from expectation is by the supposition not *against* it: To turn on his cattle before the day in question, no man was used; no man therefore *expected* it: no man by being debarred from it till then was disappointed.

The second stands upon a different footing. In point of original utility there was a benefit in it, it is evident, to the Lord, and the Tenants were no sufferers, because the advantage they got was all clear gain. In point of utility resulting from expectation it was different. For some time the Lord made use of the field at a convenient time, so did the Tenants therefore along with him. They got the habit of expecting to have the use of it. In process of time there comes a Lord who from bad management or out of spite, never puts on his cattle. The Tenants having by this time learnt to expect this signal and enjoy this benefit, not seeing it, are disappointed. Hence a pain of disappointment; which is | a pain 17
that is more apt to result from this restraint, than is apt to result from the other. It is from Judges having some confused perception of this, when the matter came before them, [they] legalized the custom simply, refusing to legalize the restriction that accompanied it. However before they could justify to themselves the doing this, it is plain, the notion of an indefeasible property in a Tenant with respect to common, must have become fixed. The Lord's original exclusive right must have been forgotten. The Tenant must have been supposed to have acquired a right,

XIX *Common Law* and the restraint thus annext to it, must have been considered as an usurpation. In modern times then, now the notion of a general liberty of common in Tenants is become fixed, to reprobate such a restraint upon it seems consonant to utility. I see not how we could have said the same at a time when the liberty was looked upon in the light of an indulgence. While the Lord had it in his power to forbear the granting it, I see not how we could have denied him the liberty of his making his own terms.

More rules and more confusion. The 5th our Author gives us is that 'Customs ought to be certain. A custom', continues he 'that lands shall descend to the most worthy of the owner's blood, is void: for how shall the worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore, good'.

The supposition, we are to remember, he sets out with is this, that the Custom is proved to exist; and then these rules he gives
18 us are to tell us whether it be good or no. | The Rule we are now upon is to tell us that in order to be good it must be *certain*: and here we have, at least it is meant we should suppose we have, examples of two customs, one of which is bad because it is *not* certain (as far as this point is concerned) the other good, because it *is*. When the matter comes to be enquired into, not in the manner our Author enquires into it, but as any one must enquire into it that would understand him, it turns out that these two customs are the same. What is *certain* is, that custom can not be at once good and bad. How are we to account for this? The truth of the matter is that our Author is wandering from the subject—he has lost his way in the *country*, and is got back by instinct to Westminster-Hall. Instead of thinking what the custom is, he is thinking of the manner in which it is to be pleaded. 'You have got possession of an estate which you claim as next male heir to the last owner. You are sued for it by a nearer female heir. You defend yourself and allege in pleading that your female competitrix could have no ground to expect the estate should be relinquished to her, for that in taking it to yourself you do no more than conform to what has been the custom. The custom in the jurisdiction in which the estate lies, is, you say, that the next male of the blood has always succeeded in preference to a nearer female. This being the case how are you to express yourself? Why, e'en say so, speak so as to be under-

stood. Whom you mean by the next male, we know—But whom you may mean by the most worthy, is not clear. It may be, you mean that you are a better man than your Father or your elder brother, which may be very true, but would | never give you a title to the estate. [’] Such we suppose on this occasion may have been the language of the Judges.* The fact then, we see, is, not that here are two customs, the one good, the other bad: but one and the same custom, well *pleaded* in one way, badly in another. Take it for granted as our Author states it, that such a custom there has been, that time out of mind the most worthy of the owner’s blood has succeeded, the custom is a good one. How shall this worth be determined is a question easily answered. How? why e’en as it has been determined hitherto. What has been done for ever until now, may e’en as well be done from henceforth for ever. XIX *Common Law* 19

Another example our Author gives us of two Customs the one good the other bad, on the score of certainty, is this: an example of very different complexion from the former. Here really are *two* customs. ‘A custom to pay two pence an acre in lieu of tythes, is good; but to pay sometimes two pence and sometimes three pence as the occupier pleases, is bad for its uncertainty.’

The general custom in this case is that of paying Tithes: in which the Parson is the party in whose favour, the Land-occupier

* It may here be asked, how came I to know, that he who claimed an estate upon this ground, whoever he was, by most ‘worthy’, meant ‘next male heir’? The case is, that Lawyers, not more gallant in this article than Grammarians, have a notion or at least a saying current among them, that the male sex is more worthy than the female. Now what is very supposable is that the Lawyer who in the case in question had the drawing of the plea, happening to have this notion come across him, gave this description of his Client’s title to the estate in contradistinction to that of his competitrix: thinking it enough to intimate that it could not belong to *her*, on account of her being a *woman*, not considering that in order to make out his title fully, it was necessary for him to shew that it belonged to *him* in exclusion of all other men. But as his title as against other men was founded upon the common and known rules of descent, the necessity of stating this part of it particularly might have escaped him. Of this mistake then, the natural consequence was, not that he should lose his cause, but that he should be obliged to amend his plea. After all, it would be well for the Law, if no descriptions passed for good in it that were less precise than this. Next friend, for next relation, 12 men, or 12 honest and discreet men, for a Jury, and many other examples too tedious to mention, will readily occur to any one who is conversant in the science. To strain at a gnat, and swallow a camel, is a character not peculiar to the Jewish Lawyers.

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the party at whose expence. This custom extending, with a very few exceptions, throughout the Realm, is a general one. And this we are to look upon as already perfectly legalized of old. The particular custom, viz., that which is supposed to be now proposed for perfect legalization is a custom therefore of an opposite nature, an exception to this custom taking place, as alleged, under such a circumstance as that of a payment to the amount in question. Under the general custom, the Parson *acts*, i.e. uses, such articles of property as come under the description of Tithes, the Land occupier *forbears* to hinder the Parson. Under the particular custom opposed to it, the Land-occupier takes them, the Parson
20 forbears to hinder the Land-occupier. | But this forbearance of the Parson has not taken place but under this circumstance, annext to it as a condition, namely that of his being permitted to *take* on his part of the Land-occupier's property such a sum of money, the Land-occupier *forbearing* to hinder him. To have a clear idea then of this case, a man must have an idea of three distinguishable customs or courses of conduct. 1st. The general custom with respect to Tythes, in which the Parson is active, the Land-occupier passive. 2d. A custom respecting the same Tithes, standing in contradistinction to the former, in which therefore the Land-occupier is active, the Parson passive. 3dly. A custom respecting a sum of money, in which the Parson is active, the Landholder passive. But of these two latter customs he must conceive that the 2d never subsists but in concomitancy with the 3d, which accordingly stands connected with it in the character of a condition. If the 3d had in any instance not subsisted, the 2d it is to be supposed would not have subsisted: consequently in that instance, the first would: for of contradictory states of things, the one or the other must subsist. Now then it is the 2d of these customs that is alleged in one case to be bad on account of a defect in the 3d in point of certainty. In the instances in which anything can be shewn to have been paid, no one assignable sum has been paid. What has been paid has each time been what the Land-occupier thought fit to pay and the Parson to receive at that single time. Now a custom, according to the no-
21 tion we have of the single acts of which it is | [composed,] must in all circumstances of their description essential to the matter in hand, [be] the same. But these are different. From such variety of action no fixed expectation could result. There could be no

ground on the part of the Land-owner that the 2d custom in which he was the party favoured would be conformed to on the part of the Parson in future. No more could there on the part of the Parson for intending to conform to it. The Parson on the contrary would continue to expect that benefit which would accrue to him by the Land-owner's conforming to the 1st custom. Not receiving it he would be disappointed: he would feel a pain of disappointment. That utility therefore which results from the bent of expectation requires that the decision in this case be for the parson against the validity of the pretended custom. XIX *Common Law*

The two last of the three customs, we may observe, forming one reciprocal custom, are of that sort which bear unquestionable marks of express Will. They must have originated from compact: and this compact carries with it that legal obligation which is in general annext to compacts. This compact in the case put of the bad custom, is only for a certain time, the legal obligation annext to it can last therefore only for that time. In the case of the good custom it appears to be perpetual, the uniformity of the custom giving it that construction. | 22

The last example our Author gives us under this rule is a single one of a custom, which though at first to appearance bad, is nevertheless really a good one. 'Yet a custom', says he, 'to pay a year's improved value for a fine on a copyhold estate, is good: though the value is a thing uncertain. For the value may at any time be ascertained; and the maxim of the Law is, *id certum est, quod certum reddi potest.*'

What we are to collect from this example is, that a custom may be taken for 'certain', or rather I would say, *uniform* is, that howsoever it may vary in itself, its variations may be comprized under one description. They are of such a nature as that they may be all alike expressed by one and the same form of words; which form of words presenting itself at any time to the conception, will suggest the idea of one of those variations at the time and no more. This rule is perfectly consistent with our doctrine of expectation. To apply it to the example. What is to be paid as the condition of being permitted to occupy the Copyhold in question is, at one time one Sum, at another time another: at no two times perhaps the same. Nevertheless the form of words serving to express what is paid may be all along the same. It is a year's improved value, we may say. And by saying thus we

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shall all along describe with equal truth what is to be paid at the time in question, be it ten pound, be it twenty | [23] pound, or be it any number of pounds whatsoever. In the year 1710, it may be ten pound; in the year 1720 it may be twenty Pound. In the year 1710 therefore it is one sum, in the year 1720 it is a different one. And yet the form of words serving to describe what is in the year 1710, and the form of words serving to describe what it is in the year 1720, are the same. But though the same form of words is expressive at one time of one sum, at another time of another, at no time is it expressive of both these sums or of any other two sums at once. It is at any given time one certain sum that it expresses. Tis to one certain sum therefore that, at any given time, the expectation is fixed. I am the Landlord. The year's improved value in 1710 is £10. In 1720 it is £20. In 1710 therefore it is £10 that I expect to receive and no more. In 1720 it is £20. I am the Tenant. In 1710 that I expect to pay: in 1720 it is £20 and no less. As I know all along what is the year's improved value my expectation has a mark to fix itself to: it would not if the amount of the sum in the two cases had depended upon the Lord's or any person else's pleasure. How the utility of the case depends upon the course of expectation, it can not be necessary after such frequent repetitions to explain.

The instance of this *maxim*, which is one of the least exceptionable too of the scraps of latin that are bandied about by Lawyers under that name may serve to shew how little they are calculated to give a clear and satisfactory solution of any legal question.

24 Try it upon this custom, which is a good | one. You want to prove it good. It succeeds to admiration. *Id certum est quod certum reddi potest.* Therefore a Custom to pay a year's improved value for a fine is good: for the value may at any time be ascertained: certainly by looking at the lease.

Now try it upon another which is a bad one. You want to prove it good. It succeeds equally as well. *Id certum est, quod certum reddi potest*, therefore a custom to pay in lieu of tithes whatever the occupier of the land pleases, is good: for what he pleases to pay may at any time be ascertained: certainly by his telling you.*

The 6th Rule our Author gives us is one that to judge of it by

* Maxims. It is well worth reading what Mr. D'Alembert observes concerning the maxims of natural philosophy, which once made so great a figure in the Schools. Conceive it spoken of our law-maxims, and it ap-

itself is not true: is not warrantable by any decisions that can be produced: to judge of it by example, it is the last-mentioned rule over again. 'Customs', says he, 'though established by consent, must be when established, compulsory; and not left to the option of every man, whether he will use them or no.' This notion of legal obligation starting up in the way of equivocal obligation without a productive cause is somewhat whimsical. With so sound a theist as our author, one would imagine, that had he been thinking when he copied, it could not have passed. He is speaking we must not fail all along to remember of the condition a custom is in when proposed in a superior Court for legalization. Now then, says he, to be a good custom, it must even at that period *be compulsory*. | 'Though established by consent it must (*when established*) be compulsory.' Now then what is it that is to have established it? Consent? are consent and compulsion then the same? Is it the same to consent to do a thing, and to be compelled to do it? Of the way in which an act or a custom originally spontaneous may be provisionally legalized, and thereby become compulsory: viz.: by the act of an inferior local jurisdiction, of this way so often mentioned by us our Author has we may see, no notion. Purely spontaneous there must be none. They must be all compulsory. And they must absolutely have become *compulsory* without a cause. Meantime admitting the cause, that this should be the case with all customs is impossible. Some customs there are [which] at the time of their being proposed to a superior court for legalization must be purely spontaneous: Because to legalize them lies not within the competency of any local jurisdiction. Such as those concerning Tithes.

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25

So much for the Rule. Now then for the example—'Therefore a custom', continues our Author, 'that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.' He might as well have said, indeed much better, of this custom as of one before instanced that it is bad for its uncertainty. And indeed to look at it, we may observe that it is exactly of a piece

plies with equal truth. They prove contradictory propositions, says he, with equal fluency. You may prove one thing by them as well as another. Those of natural philosophy and those of Jurisprudence are the produce of the same ages, and of the same sort of men.

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with the custom of which that observation was made. If the mere spontaneity of the contribution were all there was |[26] to urge against the validity of it, that is its capacity of being legalized in the superior Court, we may judge from what has been already said, whether that objection would be a fatal one.

As a help to any one who might be inclined for his own satisfaction to analyze the custom here instanced in the manner that several others have been analyzed, it may be of use to observe that in this Custom the parties favoured are those into whose hands the money is paid in trust for the maintenance of the bridge: the parties favoured beneficially and ultimately such as have occasion to use the bridge. The parties burthened are those who are liable to pay the rate. The legalizing Jurisdiction is the assembly of such persons whether rateable inhabitants or others, as impose the rates.

The 7th and last of these choice rules is, that 'Customs must be *consistent* with one another': that is we are to understand, a custom, having subsisted is not a good one, when owing to the subsistence of some other custom the existence of that in question is impossible. 'Customs must be consistent with one another; one custom can not be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd.' Hitherto we are at sea; we are pitching and tossing among generals: we can feel no ground. My Readers long to see I make no doubt what our Author has in store for us. They cannot but be curious to see an example of a custom which being impossible to exist, has existed, and has been found bad. I will no longer sport with their impatience. 'Therefore', continues our Author, 'if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, not both stand together. He ought rather to deny the existence of the former custom.' 'Cannot claim a right'? How is this? I have been used to obstruct your windows as often as you have
27 made them look into | my garden, and must not say so, while you are at full liberty to avail yourself of your having made them? Is this the case? Am I obliged to allege what is not true, that you have never made such windows?

The truth is our Author has bewildered himself on this occa- XIX
sion just in the manner he bewildered himself in a former. The *Common*
quality he has bestowed upon the custom, is a quality that be- *Law*
longs to the description of it, and not the thing itself. Here are not two contradictory customs: but one custom which either has subsisted or has not. The second instance he has mentioned is indeed contradictory to that which he *should* have stated: and therefore assuredly they cannot both have been proved; for they cannot both of them have subsisted. But to the custom he has stated as one that it is contradictory to, it is not contradictory: tho this custom which he has stated supposing it to subsist is a custom that no man could avail himself of. It is indeed but half a custom: according to what we have observed in the sense that must be put upon the word when it occurs in Law. It is only an assemblage of one man's acts. I have a piece of ground. I have a House built upon it. What is it that the Custom I am alledging is to prove? Not my title to the ground, to the House, or to the windows. That is supposed to be out of dispute. What I have to prove, is, that you, my neighbour, have no right to make such use of the ground which to other purposes is yours, as shall hinder the light from coming to my windows. This I mean to found on Custom. What then is the Custom I must allege? A Custom of mine to have up a House with windows in it? No that would prove nothing. That would be mere action on my part, nothing of forbearance on yours. You would not be concerned in it. The Custom that can affect you must be that of a forbearance on your part to interpose any such objects upon your ground as shall have excluded the light from the windows of the house built on mine. Now this is certainly a custom that may very well have subsisted: whether fit to be legalized on that account is another question.*

Now this is certainly a | custom the existence of which if you 28
mean to justify your right of intercepting the light from my windows you ought to deny; and accordingly therefore plead Nul tiel Custom: or else deny that it ought to be legalized, and accordingly demur to it. But the Custom as our Author has stated it you can have no occasion to deny; since it makes nothing against you: your business would be to demur to it. | 29

Thus much concerning the rules our Author has given us rela-

* This is one of those many cases in which the Law remains in glorious uncertainty: and from the very nature of Common Law, must for ever

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tive to Particular Customs, under the head of *validity*. We now come to the Rules he gives us under the head of *allowance*. And under this head he gives us two rules: two perfectly distinct rules, much more so than several of those we have seen, though thrown together into one paragraph.

The 1st is that 'Customs, in derogation of the Common Law, must be construed strictly'. The 2d is, that 'All Special Customs must submitt to the King's Prerogative'. Customs, in derogation of the Common Law: that is all local, or as he calls them, special Customs: for if they are not, as far as they extend, in derogation of the Common Law, there is nothing special in them. These then are to be construed strictly. What is it for a Custom to be construed strictly? What is there to construe in a custom? Let us proceed to the example. 'Thus by the custom of Gavelkind, an infant of fifteen years may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple, or for ever. Yet this Custom does not empower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued.'

Our Author's meaning is I suppose that because a man has a

do, while the matter rests upon the footing of Common Law.

Tis from individual decisions that the Common Law in this behalf is to be collected. Now all that can be done by any individual decision is to pronounce that in the individual case that called for it, the Deft. had or had not built too near to the Pltf's window's. How much too near is what a Judge or Jury is not warranted to say. Whether it is by a General Verdict that the matter shall have been decided, or by argument upon a Special Verdict is a chance. If by a General Verdict no sort of instruction for future litigants can possibly transpire. If upon a Special Verdict, then indeed some very vague imperfect lights may possibly be collected. The special verdict may state in feet and inches the distance the second building is at from the first. But this can only apply with any precision to buildings circumstanced exactly as those two are. And fifty sets of litigants may be ruined before any tolerably comprehensive set of rules can be deduced. A Statute might draw the line at once.

This matter in truth seems not to rest upon expectation: but upon original utility. For there is nothing but the idea of expediency to determine the expectation. The question proper for consideration in each case is, Which would suffer most at the moment the erection of the second building is proposed, the owner of the first erected building upon being deprived to the degree in question of a use he has been accustomed to put it to? or the owner of the second by being prevented putting his ground to the use he designs to put it to?

right originating from special Custom to do a certain sort of acts, XIX
or receive a certain set of services, he is not from thence to be *Common Law*
considered as having a right to do another sort of acts, or receive
another | sort of services, that are analogous only to the former, 30
and not the same: or if he has a right to do a certain sort of acts,
or receive a certain sort of services under certain circumstances,
he is not from thence to be considered as having a right to do
that sort of acts or receive that sort of services under circum-
stances that are analogous only and not the same. This I take to
be the meaning of his rule; but what truth there is in it, what
use can be made of it, or with what certainty it can be applied,
is what I leave to be considered. What sorts of acts or services
are analogous to one another in the infinity of cases that might
be put, without being the *same*, or to use our Author's words,
what is only strict construction, and what absolute disallowance,
is a question that might I fear to infinity be debated. The ex-
ample our Author has put is one in which the acts which a man
claims to do are without dispute the same in the case in dispute,
as in the case out of dispute, and the question is only concerning
the circumstances under which those acts may be done. The
custom between the alienor and alienee of executing such a con-
veyance as is called a deed of feoffment is here represented to
stand as a condition to that custom between the alienee and the
rest of mankind with respect to the lands in question. This cus-
tom our author says does not impower him to use any other
conveyance, or even to lease them for seven years. Very likely not.
Very likely it would be held not to do so were the case to come
in question. The act of executing any other species of convey-
ance can certainly at most be only analogous to, and certainly
is not the | same with the act of executing a deed of feoffment: 31
supposing all the while that the principal custom is really clogged
with this condition.*

* The truth is the custom is not clogged with any such condition if we may take our idea of it from a very full and explicit record quoted by Robinson in his *History of Gavelkind*.[a] From this Record confirmed by a great number of others that are either quoted or referred to, our Author might as well have taken his idea of the matter as from his own imagination and the short dictum of Lord Coke, to which he refers but which does not come up in any degree to what he has advanced. The Record runs thus:

The following are the passages in

[a] B. 2. Ch. 3. p. 194.

XIX *Common Law*

| 33 The other Rule our Author gives us concerning the allowance of Customs is that 'All special customs must submitt to the King's Prerogative. Therefore if the King purchases lands of the nature of Gavelkind, where all the sons inherit equally; yet upon the King's demise, his eldest son shall succeed to those lands alone'. Thus far our Author. This rule is much more precise and intelligible than the former: and one may venture to give credit to it. No opportunity would the antient Lawyers neglect to shew a partiality to the King and to render his condition as unlike and as preferable as possible to that of a subject. In this instance indeed, it is of little consequence. This submission to the King's Prerogative, we are to understand I suppose of such customs only wherein the King is the party at whose expence. With regard to any in which he was the party favoured there can be little doubt but that Prerogative would submit.

'And thus much' we will conclude with our Author for the second part of the *leges non scriptae*, or those particular customs which affect particular persons or districts only.

Lord Coke that are relative to the subject.[a] 'Customs are likewise taken strictly, *though not always literally* . . . An Infant by the custome of Gavelkind, at the age of fifteen, may make a feoffment: yet he cannot by the custome make a will at that age to pass away his land; to make a Lease and Release, which amounteth to a Feoffment.' N.B. The trick of conveying by a Release preceded by a Lease from the same person, was not at the time of that record invented; but instances are given by the industrious and judicious Robinson of releases without number that were held good. . . . But these 'customs', continues Lord Coke, 'are not to be confined to literal interpretation, for if there be a custome within any Manor, that copyhold lands may be granted *in Feodo simplici*, by the *same* custom they are grantable to one, and the heirs of his body, for life, *for years*, or any other estate whatsoever; because, *cui licet quod majus, non debet quod minus est non licere.* So if there be a Custome that Copyhold lands may be granted for life, by the *same* custome they may be granted, *durante viduitate* . . . Before the Statute of 32 H. 8 Lands in certain Boroughs were devisable by custome: by the *same* custom was *implicitè* warranted, authorizing Executors to sell lands devisable.' | 32

It is true that in two instances according to Robinson (for I have not been at the pains of examining the Year-Books which he refers to) Judges not liking it should seem the custom, have chosen to understand that the conveyance 'must be by feoffment'. But these Authorities are overpowered (if numbers will do it) by others which he has *quoted* from Records. The Reader may perhaps by this time be disposed to join with me in thinking, that no great dependence is to be placed upon this Rule.

[a] Copyholder s. 33, p. 76.

[SECTION XX]

COMMON LAW: PARTICULAR LAWS

'THE third branch of them' (meaning the *leges non scriptae*), says our Author, 'are those peculiar laws which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.'

'It may seem', (continues he) 'a little improper at first view to rank these laws under the head of *leges non scriptae*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of Sir Matthew Hale, because it is most plain, that it is not on account of their being written Laws, that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors, were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognize any foreign power, as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest, of its subjects. But all the strength that either the papal or imperial laws have obtained in this realm (or indeed in any other kingdom in Europe) | is only because they have been ad- 2
mitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptae*, or customary laws; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptae*, or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII, c. 21, addressed to the king's royal majesty.—'This your grace's realm, recognizing no superior under God but only your grace, *[hath been and is free from

* [Blank left in MS. for rest of quotation. Supplied from I Comm. 80.]

XX *Common Law* subjection to any man's laws, but only to such as have been devised, made, and ordained within this realm for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same: not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the customed and antient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise.']

3 | 'To rank these laws altogether under the head of *leges non scriptae*, or unwritten laws', 'may seem' even in our Author's notion, 'a little improper at first view': and I trust it will not seem much otherwise on a second. If it be true, as our Author says, that in this he has but copied Sir Matthew Hale* it will appear that by the terms 'written law', and 'unwritten law' they both of them meant a something which they neither of them knew how to express, and that when they employed these two phrases, they had no such thing as any determinate ideas to annex to them. If this be excusable in the plain practical lawyer of the 17th century, something better might have been expected from the critical and enlightened Professor of the 18th. The age of Locke forms an epoch since which it is no longer so excusable to use words [loosely] as it might have been
4 before. |

As to Written Law, the idea of it we can collect from what he says about it, is at best but negative. It is not a set of Laws having been set forth by authority that entitles them to it: at least if it entitles them to acquire it, it does not entitle them to keep it. For as to the particular Laws in question the fact is, that when they first came into existence it did belong to them: Written they *then* were: this is what is supposed: but this we are to understand continues or ceases to have been true, according to the reception they meet with afterwards. In the Roman state they first made their appearance; they then came *written* into the world: they are introduced here; but whether they continue to have been written depends upon the personage who introduces them. If it be a Legislator they are written still: If a Judge their

* Hist. Com. Law. c. 2.

written-ship, if so one may call it, vanishes. Hence we may understand they may in different places be written and unwritten at the same time. Still written for example in what remains of the Roman State: unwritten in our own. Nay even in the same place at the same time, and the same part of them: unwritten by being introduced by Judges; written by being introduced by the Legislature. XX *Common Law*

| I cannot help calling to mind upon this occasion a certain Divine I once heard preach, whose notions tallied exactly with this of our Author. He was making his prayer before Sermon; and willing to pay God Almighty a higher compliment than common, complimented him with the power of 'altering events': 'O God, who alterest all events'; which one sees there can be but one way of doing which is making them to have happened otherwise than they have. This extra-ordinary power which the good divine in the fullness of his zeal attributed to God Almighty, our Author attributes to human Judges; who seem according to his notion to have possessed in this respect a power superior to that of the Legislature. All that our domestic Legislature does by these imported Laws is to make them have been what they have been: It is a stroke of legerdemain reserved for Judges to make them to have not been what they have been. All that is clear in this whole business, is that the ideas annext by our Author to these terms are exquisitely confused. The truth is that the word *written* is used by him to express two ideas: both of them quite different from the idea annext to the word in common language, and each of them totally different from the other. This being the case we cannot wonder to see it at one time affirmed, at another denied of the same subject. In the first sense in which it | is used, it means real Law, that is Written Law means an assemblage of certain symbols containing an expression of the Will of a certain person or persons of whose will it purports to give an account, viz. of a person having authority to cause his will to be obeyed in the State in which it issues, by that person or those persons themselves really as such delivered. In this sense, in short, it signifies the authoritative expression of the will of a Legislator generally: in contradistinction to Unwritten Law, which is not the authoritative expression of the Will of any Legislator. In the second sense it means the authoritative expression of the supreme Legislator of that State into which it is considered as 5 6

XX *Common Law* having been adopted. Now then in the first of these*† | two senses the assemblage of words we speak of when we say the Civil Law is part of it *written*, part of it *unwritten*. In the 2d it is none of it *written*: except such part of it as is *made written* (so we must speak) by express words of adoption uttered by the Legislature, and this part may as well be of the sort which in the 1st sense is termed *unwritten*, as of the other that is called *written*. I think it is plain these unhappy words 'written' and 'unwritten' can never answer the purpose of conveying any clear ideas as applied to the objects they are here put to characterize. To clear up the confusion to satisfaction we must find out some other pair of words: let this other pair be *authoritative* and *unauthoritative*: authoritative for written, unauthoritative for unwritten.

We are considering Law all this while, it is to be observed, as

* The truth is the Common Law properly so called, if by it we mean any collection of words, is the expression of the supposed Will not of any Legislator but of certain Judges, and yet not uttered by those Judges. The Civil Law considered in itself is the expression of the Will of a certain Legislator, delivered by that very Legislature of whose Will it purports to give an account: considered as introduced in this country by Judges, it is still the expression of a Legislator, to wit, that Legislator as before, but put in force not on account of its expressing the will of that Legislator, but on account of its expressing the Will of those Judges who by adopting that will in the words in which it is expressed, have made the expression of that Will the expression of their own.

Meantime if Judges can not, what our Author would have it they do, make that not to have been an authoritative expression of Will which has been, they can do another thing which is the reverse, and make that to be an authoritative expression of Will which before has not been. And this is what our Judges do when they adopt as binding the commentaries on and unauthoritative parts of the Civil Law. Taking these Commentaries *in terminis* they make the tenor of them the text of a Law as much as the Institutes and Digests were on which they are commentaries. 8

Neither text nor Commentaries has any binding force here of itself; but to one as well as another they may give all the binding force which their own will has.

† What I give for an article of Common Law I give in the words taken from some printed book, or in my own. If from a printed book they are the words either of the author of that book, or of some Judge whose words they import to be. If of a Judge, they are either spoken of the case directly before him, or said *arguendo* with reference to other cases supposed analogous.

A rule of Law must be predicated of some certain assemblage of words —It never can be predicated of a bare assemblage of naked ideas. It is words only that can be spoken of as binding: because it is words alone that are producible with certainty when occasion comes for any individual to be bound.

an assemblage of certain words, not merely an assemblage of modes of conduct of a ruling body, nor bare ideas, nameless ideas of such modes of conduct, but an assignable assemblage of certain words. This being premissed, XX *Common Law*

By Law *authoritative* I mean an assemblage of words purporting to express the Will of a Legislator, and by express declaration delivered by him for such. Law Authoritative.

|9 By Law *unauthoritative* I mean an assemblage of words expressing either 1st, the Will of certain Judges, acting as such, or else, 2dly, inferences drawn from what is supposed to have been such Will, or 3dly, what is supposed to have been the will of a Legislator. Law unauthoritative.

From this account of Law *authoritative*, it is plain that it may be distinguished into parts, to each of which may be given the name of a Law: that Law unauthoritative can not be distinguished into any such parts: and that therefore it would have been better, had it never been characterized by the name of Law: had it never been characterized by any other name than that of Jurisprudence: body or branch of Jurisprudence. In Law authoritative there are Laws— Jurisprudence.

Of this term *authoritative* it is plain that it is a term of relation: referring to some person with respect to whom the thing it is predicated of is authoritative: referring to some person whose Law it is, and whose authority there is for declaring it so to be. It is plain therefore that Law, (or we would rather in this case say Jurisprudence) which is not authoritative with respect to a Legislator, may yet be authoritative with respect to a |Judge. 10

Thus much further we may also understand that Law which at its first appearance was unauthoritative may by adoption be rendered authoritative: i.e. with respect to the potentate who adopts it: in this case I would say it was Law *adoptive*. In this case we see the words whether purporting to contain an expression of the Will of the potentate in question or of some other potentate, make their appearance first: it is not till afterwards that the potentate in question declares them himself to contain an expression of his will: which he may do either by acts or by express words. If a Legislator, by words: if a Judge, by acts. For a portion of Jurisprudence then consisting of words that are the expression of the Will of a Potentate but who has not declared them to contain the expression of his will till some time after their first appearance, we have this name *adoptive*. For a por-

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tion of Jurisprudence consisting of words that are the expression of a Potentate who delivered them as the expression of his will *at* the very time of their first appearance we must find some other name: let this name be *autographic*.* In autographic Jurisprudence the will came before the words. In adoptive Jurisprudence, the words came before the will. A portion of Jurisprudence
11 adopted by a Potentate, | may, before adoption, have appeared either in that Potentate's own nation, or in some other. If in his own, I would call it home-bred, or native: if in some other, I would call it imported.

Having made these distinctions and got this nomenclature to express them, now let us apply them: let us observe how far they may be seen to subsist in that portion of Jurisprudence that is called the Civil Law. First let us consider it as subsisting in the Roman State, where it was native.

1. The Institutes being composed by the Legislator (Justinian) were authoritative autographic Law.

2. The Digests or Pandects, were at their first appearance, unauthoritative writings of eminent Lawyers, were at their first appearance Jurisprudence unauthoritative: that is the several portions of which they were composed were each at their first appearance portions of Jurisprudence unauthoritative. Collected in a body, and adopted by the Legislator, (Justinian) they became authoritative adoptive Law.

3. The new Code being composed also by the Legislator (Justinian or the other Legislators his predecessors) was also authoritative autographic Law.

4. In like manner the Novels, or new Constitutions being composed by successive Legislators of the same state, became also as fast as they appeared authoritative autographic Law.†

* From *autos*, self, and *grapho*, to write. I would not introduce hard words without necessity: but in English self-written Jurisprudence would seem to intimate Jurisprudence not that had been written by such a *person's self*, but by the Jurisprudence itself.

† What is here said concerning the Digests, Code, and Institutes respects them only in as far as the propositions they contain are propositions taking for their object *sorts* of actions: in respect of these alone the potentate of whose will they contain the expression acted as a Legislator in respect of such propositions, if any, as purport to take for their object individual actions or individual persons, the capacity in which he acted can be considered as no other than a mixt one; being partly that of simple

| [14] Now let us consider the Civil Law as subsisting in our own state, into which it has been *imported*. XX *Common Law*

None of it, neither Institutes, Digests, Code, nor Novels, are (it is plain from the definition of the word) *autographic*. Conceive them all to be adopted by our own Legislature, all of them are, as much as they were in the state where they were native authoritative with respect to the Legislature. Conceive them all to be adopted not by any express declaration of the Legislature, but only by acts of certain Judges, they are not authoritative with respect to the Legislature but only with respect to those Judges. Speaking in general and without reference to either potentate in particular, we should rather say they were not authoritative. Conceive a part only of each of them (as is the case) to be adopted by the Legislature or the Judges, then is that part alone, respec-

Historian, partly that of Legislator. Historian in as much as he relates such and such acts of Judicial power to have been exercised on such and such individual persons for such and such individual actions: Legislator inasmuch as he intimates it as his will that acts of power of the sort in question shall be exercised in future on individual persons of the sort in question for individual acts of the sort in question: giving the individual objects as *patterns*, and leaving each man that may be concerned, from the contemplation of those patterns to make up for himself ideas of the sorts they respectively belong to, as he can.

[12] | It may be objected that from the nature of language these objects of Jurisprudence (viz. persons, acts, as also frequently, things,) cannot be expressed but in sorts: since names of things and of acts are almost all names of sorts: and although the names of persons may be individual viz. what are called proper names, yet is the idea of a sort of person compleatly expressed by the name of the individual, coupled with the names of the sorts of things and acts to which in the most narrow description that can be given of the objects of a proposition of Law, he is represented as standing related. This is very true; but the sorts of acts, things, and persons thus necessarily expressed are frequently so narrow as not to agree to any individuals beyond those to which they were primarily applied. To apply the portions of Jurisprudence that treat of them to any future case a further abstraction must be made than is expressed by the terms employed in that portion of Jurisprudence.

However the Legislator if he declares not the sorts himself that are the objects of his future will, he declares the words from which he will have men make up their own ideas of such sorts. If he gives not the words of any rule, at least he gives the words of an example.

I am sensible that the observations in this note are not so clear as they might be made by the help of examples; but to give examples would require discussions too ample for the limits of this design. I mean not therefore that the observations here given, should be taken for anything more than loose and undigested hints. | [13]

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tively, authoritative. The misfortune is that this part which is authoritative is not separated from the rest by any description significative of the words contained in it: it is not so characterized by those who have adopted it as to be capable of any mechanical separation from the rest. It is only separated by a most loose description of the things which the words composing such part of it may be supposed to signify: and even of this part, supposing it mechanically separated, the import is to be understood to be
15 limited by such exceptions and conditions as are to | be deemed annext to it by our native Jurisprudence. Unless these limitations be understood to be included in the description of the part itself. Thus vague, thus deplorably vague is the most precise description that can be given of this branch of that great body which is intended to serve us for a rule of action. We are sent to hunt for it through a body as extensive and as dark as that into which it is adopted. Judged by a standard the parts of which are every where and no where, commanded to do they know not what, and punished they know not why, such, O Legislators, is the state of uncertainty and distraction in which the people lie abandoned, while ye are sleeping!*

* What has been above applied to the Roman imperial Law may be applied with little variation to the Roman Canon Law. It will not be necessary again to enter into the details of the application.

The paragraph however with which our Author concludes the account he gives us of the Canon Law ought not to pass unnoticed. It concerns the Canons created by Convocation in 1603, being in point of time the last remnant we have of native autographic Law relating to Ecclesiastical matters enacted by a purely Ecclesiastical assembly of Legislature.

16 | 'As for the Canons enacted,' says our Author, p. 83, 'by the Clergy under James I, in the year 1603, and never confirmed in Parliament, it has been solemnly adjudged,' says our Author, 'upon the principles of Law and the constitution, that where they are not merely declaratory of the antient Canon Law, but are introductory of new regulations, they do not bind the laity; whatever regard the Clergy may think proper to pay them.'

From this account, a person would be led to imagine, that any Clergyman as well as Layman, might choose whether he would obey them or no; since it seems intimated that they bind the Clergy no further than the said Clergy think proper to pay regard to them. This being the case they have just as much binding force as that which has none at all. Is this the case? I am apt to think otherwise. May a Clergyman be punished for disobeying any one of them? I am apt to think he may. At least the reason given why they are not binding on the laity does not hold good in point of fact with respect to the Clergy. The reason is, that they (the

The remainder of what our Author tells us of that branch of the Common Law in the more extensive sense of that word which consists of those Particular Laws as he calls them that come under the name of Civil and Canon Law, falls under two heads. First a short enumeration of the Courts in which these Laws are taken for the rule of Judgment: and 2dly a few observations, in proof of the subordination in which these Courts are holden. | As to 18 the 1st head, what is said under it I shall content myself with transcribing, without remark.* XX *Common Law*

'There are four species of Courts', says our Author, 'in which the Civil and Canon Laws are permitted [(under different restrictions) to be used. 1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law courts christian, *curiae christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by act of parliament, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.']

laity) were not represented in the Assembly by which these Laws were passed. Now the Clergy were then as fully represented as they ever have been. Nor was the Royal assent wanting. | 17 But there is no need of argument. In the same solemn judgment in which it is declared they are not binding on the laity it is declared they are binding on the Clergy and this not given as a new opinion, but as recognizing a like opinion that had been given before.[a] This being the case it is plain their binding force upon a Clergyman no more depends upon any 'regard the Clergy may think proper to pay them', than the binding force of an ordinary Statute on a layman, does upon the regard the layman 'may think proper to pay them'. All option is out of the question in one case as in the other.

* P. 83 Here transcribe down to 'concerning them' in p. 84. [Transcription made by editor from I Comm. 84–5.]

[a] 'The King's consent,' says the Ch. Just. of the King's Bench, it was Ld. Hardwicke, in giving the Judgment of the Court. 'The King's consent' (says the Ld. Ch. Justice in the report referred by our Author) 'to a Canon *in re ecclesiastica* makes it a Law to bind the Clergy, but not the laity.' Strange's *Reports*, Vol. 2, p. 1059.

XX |[19] Then follow these particulars.

Common Law 'And first', continues our Author, 'the Courts of Common Law have the superintendency of these courts; to keep them within their jurisdictions, to determine wherein they exceed them,* to restrain and prohibit such excess,† and, in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.'

This I shall pass without comment. The 2d of these particulars is as follows.‡ [Rest of MS. paged as inserenda.]

['2. The common law has reserved to itself the exposition of all such acts of parliament, as concern either the extent of these courts, or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.']—inserenda 7—From what is said in the above paragraph, what it is the Common Law does with relation to Acts of Parliament is not, I think, very easy to apprehend. 'The Common Law', he says, 'has reserved to itself the exposition of all such acts of Parliament'. . . . This cannot be true in the natural sense of the words. It cannot be true in the sense in which we should understand the word *reserved*, if what was reserved had been mentioned to be the cognizance of such or such a matter. In that case, the inferior court ought not to give any judgment at all. If an act of Parliament be made concerning a matter before one of these inferior courts, the inferior court must expound the act to pay it obedience. He meant I suppose the ultimate or definitive exposition. This I suppose is what he meant we should understand to be reserved, but how is it that the end of the reservation is to be attained by prohibition only. The end of such reservation is to oblige the inferior Court to execute the Act of Parliament in the sense which the superior Court puts upon it. But suppose an Act of Parliament which has been deemed by the inferior Court to make for the Deft., should be deemed by the superior Court to make for the Pltf. How is the exposition of the superior Court to be enforced by a Prohibition? The purport of a Prohibition is to prohibit, the effect of it to prevent the Court to whom it is ad-

* A Hysteron-Proteron.

† Another Hysteron-Proteron.

‡ [Blank supplied from I Comm. 84.]

dressed from proceeding any further in hearing the Pltf's suit: XX
which being the case,—ins. 8—the Pltf it is plain, loses his cause. *Common*
A Prohibition can only help the Deft. when the opinion of the *Law*
superior Court is in favour of the Defendant: To help the Pltf I doubt we must have another and opposite sort of a thing called a *Mandamus*. The party that is favoured by a Court's exceeding its Jurisdiction, must be the Plaintiff. Is then the case so that the Court of Common Law corrects erroneous judgment given upon a Statute by these Civil Law Courts whether given for Plaintiff or Defendant, or that if given for the Defendant it leaves the error to be redressed by another Tribunal? If the former be the case, it is not by prohibition only that they operate. If the latter, it is too much to say they have reserved the exposition, even the definitive exposition of Acts of Parliament to themselves.

—ins. 3—3dly Observes our Author 'an Appeal lies from all these Courts to the *King*, in the last resort'. Our Author here takes occasion to return to the charge: he discomfits the discomfited civilians once more: and twice he slays the slain. 'Which proves,' continues he, 'that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own.* [And, from these three strong marks and ensigns of superiority, it appears beyond a doubt, that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege*; and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.']

'Which proves', continues he, 'that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own.'

Another extract from the good old law mythology, the moral of which his readers are left to find out as they can. It is fit the student should be again and again forewarned, that whenever he finds any proposition advanced by our Author concerning the King, there is more than an even chance of its not being true in the apparent sense of it. There is such a mixture of truth and

* B's note: Here finish the sentence: and repeat as much as is quoted here.

XX falsehood in whatever our Author has delivered concerning the
Common Law powers of—ins. 4—that great officer, that the safest rule I take it a man can follow, is not to pay regard to any part of it. Powers there are, many and important ones, which are exercised by the King in his own proper person, and in conformity to his own proper will as much as any power I exercise over the pen I write with; others there are which formerly may perhaps have been exercised by him, but which at this time of day are exercised not in any case by him, but by other persons in his name: exercised by officers perhaps of his appointment, perhaps not; but which by whomsoever exercised, of all persons in the nation cannot be exercised by him. Of this number is that of judging. If there be a case in which a student stands in need of instruction it is where the generality of the books that are likely to come into his hands represent things in a light different from the true one. True it is, that after many errors and much vexation and disappointment, observation and practise may let a beginner into the bottom of these mysteries; but what sort of an excuse is it to give for feeding him with falsehood, that some time or other he may chance to find it out.

In Courts of Law, by men of experience, addressing themselves to other men of experience, these modes of expression may very unexceptionably be employed. They are used for expedition; the full and precise import of them is, or may be supposed to be, well known: let it be granted, nobody is in any danger of being misled.* By an appeal to the King on the occasion here spoken of is meant, an appeal to Judges of the King's appointment called Delegates appointed by the King: or else, I know not which,—ins. 5—by the Lord High Chancellor, an officer of his appointment. 'Who is there', it may be said, 'that did not know all this.' I answer, 'They for whose use alone these Commentaries were designed.'

Hearing that the persons to whom the Appeal lies are the King's Delegates, the student gets such a notion of the matter as

* To grant this is however to grant more than is always true. Many instances in Law might be given where from representations acknowledged to be fictitious, arguments are drawn as if they were real. This is seen in no instance more consistently than in that of the King's nominal powers and functions. Many conclusions are drawn, upon the supposition of their belonging to him in reality.

serves to prove what it is given to prove, and as far as it goes is true. Hearing that it is the King, to whom the Appeal lies, he has perhaps a false notion, and if not that he gets none at all. He may understand by it that it is not the King that is to judge; if he understands that the King is not, he cannot see who is. XX *Common Law*

The point which the observation is to prove, is that the jurisdiction exercised in these courts is derived not from any foreign potentate but from the Crown of England. A proposition therefore which our Author takes for granted is that a jurisdiction exercised by a Judge from whom an appeal lies to a superior Judge who is a native or appointed by a native, is a Jurisdiction that cannot in any sense be said to be derived from a native. One should think this could hardly be the case: for a fact perfectly easy to conceive is that the Judge who received Appeals from the Court in question be appointed by a native, the Judge of the Court in question shall be appointed by a foreigner. A much more obvious proof as far as it goes and full as necessary an one, is that the original Judges of the Courts in question are all appointed by natives: to wit, by Officers that are natives, and are themselves appointed by the King. If the original Judges themselves be appointed by a foreign potentate, it is just as far from being true that the Jurisdiction—ins. 6—they exercise is not derived from a foreign potentate, as if other Judges were, to whom these Judges are appealed from. Least the student should suppose the Judges of these Courts were appointed by a foreign potentate, he is in this way given to understand that it is otherwise. But that a student of his own head should suppose these Judges were appointed by a foreign potentate seems I think full as unlikely, as that students should suppose of their own heads that the King does not judge appeals from such a Court, when they are told he does. The fact which our Author is at so much pains to prevent a student's misunderstanding, is a fact which it should seem he would be much less in danger of misunderstanding than the fact as our Author states it, which our Author has alleged to make it clear.

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